

**AN EXPLORATION OF THE CRIMINOLOGIST'S ROLE IN ESTABLISHING
THE CRIMINAL CAPACITY OF CHILDREN IN CONFLICT WITH THE LAW**

by

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Declaration

I declare that **AN EXPLORATION OF THE CRIMINOLOGIST'S ROLE IN ESTABLISHING THE CRIMINAL CAPACITY OF CHILDREN IN CONFLICT WITH THE LAW** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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Signature

(Mrs M Human)

Date

This dissertation was edited by Ms L van Kradenburg, BA HED Dip Translation Studies Unisa; Journal Copyeditor Unisa Press; Freelance Editor Unisa Language Services.

Dedication

I dedicate this dissertation to my loving husband Hans. You have always believed in my abilities, and supported me unconditionally throughout my studies. Thank you for all your patience and the sacrifices you made towards my education and personal development. I love you so much.

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Abstract

The aim of this explorative and descriptive study was to establish if criminologists could assist in the criminal capacity assessment of children in conflict with the law. A qualitative approach was utilised in order to obtain an in-depth understanding of the current criminal capacity assessment process and the role players involved in the process. Data were collected by means of a semi-structured interview schedule. Individual and focus group interviews were conducted with child justice practitioners. Purposive sampling was employed and data were analysed according to the methods of Rabiee as well as Morse and Field.

The findings of this study indicate that the current one-dimensional medico-legal assessment approach is not in the best interest of the child. A shortage of human resources, ineffective assessment tools, inadequate training of role players, and operational problems in the criminal capacity assessment process, are all factors that hamper a successful child-centred approach.

A multi-disciplinary approach was found to be the most suitable approach to assess children in conflict with the law. It was concluded that professionals from disciplines such as social work, criminology, probation work, psychology and psychiatry should form part of the multi-disciplinary criminal capacity assessment team. The important role that criminologists can play as part of this team was acknowledged in this study.

It was furthermore established that the role and function of criminologists, as well as the study field of criminology, are still unfamiliar to various practitioners in the human sciences professions. Criminologists are also still regarded as crime researchers with limited practical applications in areas of the Criminal Justice System.

Key Terms: *Child justice; criminal capacity assessment; children in conflict with the law; best interest of the child; multi-disciplinary assessment approach; criminologists.*

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Acronyms

Attention Deficit Hyperactivity Disorder	ADHD
Chief Executive Officer	CEO
Child Justice Act	CJA
Criminological and Victimology Society of South Africa	CRIMSA
Department of Social Development	DSD
Fetal Alcohol Syndrome	FAS
Health Professional Council of South Africa	HPCSA
Intelligence Quotient	IQ
Non-Governmental Organisation(s)	NGO(s)
Post-Traumatic Stress Disorder	PTSD
South African Police Services	SAPS
United Nations	UN
United Nations Convention on the Rights of the Child	UNCRC
United Nations Children's Fund	UNICEF
University of South Africa	UNISA

CHAPTER 1

GENERAL OVERVIEW AND INTRODUCTION TO THE STUDY

If we treat every unborn child as a potential asset, then we are more likely to live in a place that is safe (Holtmann 2011:5).

1.1 INTRODUCTION

South Africa is a violent country, and youth offending is not an uncommon phenomenon. Statistics recorded by the South African Police Services (SAPS) during 2013-2014, reflect this in the 57 721 charges that were brought against children (Department of Justice and Constitutional Development 2012-2013:33). Children often grow up in environments where their view of what is 'normal', 'routine' and 'acceptable behaviour' provides the framework for their development of self-identity and understanding of what is required to 'achieve' or 'fit' in the 'normal' environment (Pelser 2008:7). Many children are also consistently exposed to crime and violence in their communities, homes, schools and immediate social environments where they learn to internalise and replicate this behaviour (Pelser 2008:7), ultimately influencing their perceptions and their understanding of right and wrong. All factors that children will be held accountable for in the Criminal Justice System, are first taught by one set of adults, and then judged by another set.

Since the implementation of the Child Justice Act (Act 75 of 2008) (CJA) in 2010, the Department of Social Development (DSD) is mandated by section 34(1) of the CJA to assess every child who allegedly committed an offence. Assessment figures recorded by the Department of Justice and Constitutional Development (2012-2013:33) indicate that 18 334 children were assessed in 2011-2012, and in 2012-2013 the figure increased to 32 125.

When a child at first enters the Criminal Justice System, the initial assessment is conducted by a probation officer in preparation for a preliminary inquiry. Additionally, to establish whether a child would require further evaluation or assessment, during the initial assessment phase the probation officer is also

expected to express a 'view' on the criminal capacity of the child in conflict with the law. This is discussed in more detail in chapter 2.

In cases where the prosecution wishes to proceed with charges against the child, section 11 of the CJA requires that children between the ages of 10 and 14 years are assessed by psychologists and/or psychiatrists. This is compulsory when proof of criminal capacity is required beyond reasonable doubt. The requirements set out by the CJA indicate that probation officers and psychiatrists and/or psychologists are central to the assessment process. In other words, the successful implementation of the assessment process can depend on a number of factors such as the availability of human resources and practitioners who are adequately trained. However, in spite of the increased demand to assess children, and the shortage of social workers, psychiatrists or psychologists, the Criminal Justice System still relies heavily on the services of these practitioners (Waterhouse 2008:31).

Up until 2013, only 54 private psychiatrists and 32 private clinical psychologists were registered for performing criminal capacity evaluations for the courts in terms of section 11 of the CJA (Department of Justice and Constitutional Development (2012-2013:33). These practitioners are responsible for criminal capacity assessment throughout South Africa.

In spite of the shortage of social workers in South Africa (Moloi 2012), and of psychologists who specialise in forensic psychology (Pillay 2011:43), no mention is made of the possible inclusion of criminologists or other equally trained and equipped practitioners in the Criminal Justice System, nor the exploration of the possibility thereof. Not only can a shortage of human resources affect the successful execution of the criminal capacity processes, but it can also affect the validity and the reliability of the process if children are assessed two or three years after committing the alleged offence. This process cannot be considered to be conducive to a child-centred approach, nor is it in the best interest of the child.

In view of the shortage of human resources, it is unacceptable that the possible inclusion of other professionals (for example criminologists) in the assessment

process, is not investigated. As Hesselink and Herbig (2009:275) argue, criminology encompasses a variety of social sciences, such as anthropology, biology, psychology, sociology, history, economics and political sciences which can make their contributions, expertise and skills extremely valuable to the Child Justice System. Furthermore, as an interdisciplinary profession, criminology studies the causes, motives, triggers, influences, background (personal, familial and criminal), attitudes, associations, patterns of crime, high-risk situations and the theoretical explanations of behaviour related to crime and criminal behaviour (Hesselink & Herbig 2009:275), which are all vital and applicable to child offenders. These are core skills offered by criminologists that will provide valuable information during the criminal capacity assessment process.

Criminology as a discipline is recognised in South Africa by the Government, the academia and within non-governmental organisations (NGOs) (Herbig & Hesselink-Louw 2009:448; Hesselink 2013:138). However, in spite of this, South African criminologists are not utilised in the Criminal Justice System as often as social workers and/or psychologists. This is evident in various Acts, for example: the Correctional Services Act (Act 111 of 1998 [amended in 2004]); the Criminal Procedure Act (Act 51 of 1977); the Probation Services Amendment Act (Act 35 of 2002); the Children's Act (Act 38 of 2005); and the Child Justice Act (CJA) (Act 75 of 2008), to name a few. In all the aforementioned Acts, social workers, probation officers, psychologists and psychiatrists are the foremost designated professionals assigned by the legislature to attend to matters such as criminal capacity assessment, general assessment, compiling of pre-parole reports, pre-sentencing reports and victim impact statements.

Although improvement has been evident in recent years, criticism is still experienced from various professionals within the social and human sciences professions, and the role, practical applications and contributions that criminologists can make are still doubted by aforementioned professionals (Hesselink 2013:138). Internationally, criminology is also perceived by some professionals to lack relevance to the 'real world' and it is professed to be 'paper-bound' (Hesselink 2013:138). Maree, Joubert and Hesselink-Louw

(2003:80) postulate in this regard that the principal reason for the exclusion of criminologists in many areas of the Criminal Justice System, may lie in a general lack of ***understanding*** [my emphasis] of the discipline, and what criminology has to offer.

Against this background the aim of the present study is to explore if the unique skill sets associated with criminologists can play a role in the criminal capacity assessment of children in conflict with the law.

The researcher will provide the rationale and research problem of the study in the next section, as well as the value and importance of this study. The aims, objectives, data collection and data analysis methods utilised during the study, will also come to the fore.

1.2 RATIONALE FOR THE STUDY

Firstly, the researcher has a passion for the welfare of all children, especially child offenders. Children in conflict with the law are often the victims of dysfunctional families, where various forms of abuse and neglect dictate their future conduct and behaviour (Pelser 2008:7). There are numerous factors that deprive them of their basic human rights. Children are vulnerable and deserve the best possible interventions during their encounters with the Criminal Justice System. Not only is it in the best interest of children to receive the best possible interventions, which can identify and address the root causes of their criminal conduct, but it is furthermore in the best interest of the community and South Africa.

Secondly, as a passionate criminology student, the researcher has observed throughout her studies the endless crusades of criminologists to get recognised as professionals who can offer practical applications in all spheres of the Criminal Justice System. As previously stated, criminologists are underutilised in the Criminal Justice System. The researcher concurs with other authors (Hesselink 2013:138; Herbig & Hesselink-Louw 2009:448) that the profession of criminology is undervalued and deemed less effective in the practical application thereof in relation to other professions, due to an unfamiliarity and a lack of understanding the profession.

Thirdly, the researcher was further motivated by her interest in and fascination with the topic as she embarked on a literature review of the criminal capacity assessment process. The researcher identified the need for research in the criminal capacity assessment process, given the obvious void in this area. Only one study could be located that specifically focused on the possible inclusion of criminologists in the criminal capacity assessment of children in conflict with the law, namely the work of Dr Charmaine Badenhorst (*Criminal capacity of children, 2006*), which the author duly gives credit for.

1.3 VALUE AND IMPORTANCE OF THE STUDY

Criminological assessment differs from other professional forms of assessment compiled by social workers and psychologists. It mainly focuses on criminal behaviour of the offender, motives, causes, precursors or triggers, modus operandi, victimology, high-risk situations, criminological risk prediction and the safety and security of the society, offering a holistic view of the offender (Herbig & Hesselink-Louw 2009:448). As previously stated, South African criminologists still resort under the category of a 'scarce profession' and are not utilised as often as social workers and/or psychologists (Herbig & Hesselink-Louw 2009:448).

It is proposed in this study that criminologists could make a valuable contribution if the role they can play in the field of child justice is acknowledged. Such recognition will also open up new opportunities for criminologists. It is equally important to explore if the current criminal capacity assessment approach is in the best interest of the child. Lastly, it is important to address the current void in this area of research.

1.4 RESEARCH QUESTION

Fouché and De Vos (2011b:79) explain that before the researcher can conduct or even design a research study, there must be a clear picture of the direction of the study. This can be defined in the form of a research question and/or a problem statement; in other words 'what' the researcher needs to discover or achieve in the research, which flows from either a problem area or interest in a specific topic (Fouché & De Vos 2011b:80).

In light of the aforementioned arguments discussed in 1.2 and 1.3, the researcher poses the following question. *If and how criminologists can be utilised in the Criminal Justice System to establish criminal capacity of children?*

1.5 AIM AND OBJECTIVES

According to Fouché and De Vos (2011a:94), the terms 'goal', 'purpose', 'objective' and 'aim' are often used interchangeably as synonyms for one another. The research aim describes what the researcher plans to do, attain, or achieve in his or her study. Thus, the aim of a study indicates the central drive of the study, whereas the objectives identify the specific issues that the research proposes to examine; in other words the steps that need to be taken to achieve the aim of the study (Fouché & De Vos 2011a:94).

1.5.1 The aim of the study

The aim of this study is to explore if criminologists can be included in multi-disciplinary criminal capacity assessment of children in conflict with the law, and to explore the role that criminologists can play in this process.

1.5.2 The objectives of the study

Based on the aim of this study, the objectives are to:

- Determine if the process currently used to establish criminal capacity of children in conflict with the law, is in the best interest of the child.
- Examine the role criminologists can play in the criminal capacity assessment of children in conflict with the law.

In light of the formulation of the research aims and objectives, the research methodology of the study will be explored.

1.6 RESEARCH STRATEGY, DESIGN AND METHODOLOGY

The methodology of a study describes how the research will be conducted. It refers to the tools and methods utilised by the researcher to complete the research (Davies, Francis & Jubb 2011:10). The research approach, research design, sampling design and size, unit of analysis, the data collection and data

analysis methods will come to the fore in the following sections, and the notion behind the choices will be explained.

1.6.1 Research approach and design

A research design is similar to a detailed plan, as it provides guidelines to the researcher regarding the selection of data collection methods(s), research goal and the design most appropriate for the study intended (Delpont & Roestenburg 2011:171). In any research undertaken, qualitative, quantitative and mixed-method designs are available to the researcher, however caution should be applied to choose the best suitable approach for the study (Fouché & Delpont 2011:71).

1.6.1.1 Qualitative research

In this study the researcher employed a qualitative approach. A qualitative approach is deemed best when the researcher wants to explore a subject about which the researcher does not know much in advance, or when the researcher wants to understand the meanings, motives or reasons of the phenomenon in question (Fouché & Schurink 2011:308). In an attempt to gain a first-hand holistic understanding of the criminal capacity assessment process, a qualitative approach was employed. As Fouché and Schurink (2011:308) point out, the qualitative researcher is focused on understanding information rather than the justification thereof. The researcher is interested in the individual experiences of each of the practitioners in the Child Justice System and how they make sense of the phenomenon of criminal capacity assessment, which could not be quantified mathematically. Qualitative research furthermore accommodates different types of information to investigate the matter under study (Fouché & Schurink 2011:308).

The use of a qualitative approach also permits the researcher to investigate information as it emerges during the interviews. Tewksbury (2009:38) argues that “the advantages of qualitative methods provide a depth of understanding of crime, criminals and how the justice system operates”, which were of relevance in this study. This method far exceeds methods offered by a quantitative

approach, which are detached and analysed statistically (Tewksbury 2009:38), and which were not regarded as suitable for this study.

Research can also either be labelled as applied or basic research (Fouché & De Vos 2011a:94). Basic research, also referred to as 'pure research', is consistent with criminological inquiries (Dantzker & Hunter 2011:10). Fouché and De Vos (2011a:94) point out that basic research is not concerned with solving the immediate problems of the discipline, and the findings often have little or no applicable usage in the field being studied; in this case the Criminal Justice System.

In contrast, applied research provides answers that can be utilised to improve and change a specific issue and solve problems (Dantzker & Hunter 2011:10), as intended in this study. The aim of applied research is practical. It can be used to address problems that professionals experience in practice (De Vos, Schurink & Strydom 1998:8).

Exploring the possible contributions that criminologists can offer the Criminal Justice System is in nature applied research, as it aims to provide possible solutions to the current underutilisation of criminologists, which could lead to a change in current policies. This could be beneficial to both the Criminal Justice System where a severe shortage of probation officers and psychologists is experienced, as well as to criminologists who still encounter limited work opportunities.

1.6.1.2 Research goals

An exploratory and descriptive study will allow the researcher to gain insight into the situation, community, individuals or the phenomenon (Fouché & De Vos 2011a:95). The aim of an exploratory and descriptive approach in a study is to find out 'what' is going on, which is applicable in this study. An exploratory study arises from a lack of basic information or a new area of interests; as in this case, criminal capacity assessment. It furthermore explains central constructs and concepts, and identifies priorities for further research (Bless & Higson-Smith 1995:42).

Descriptive research presents a picture of the specific details of a situation, and focuses on the 'how' and 'why' questions which can shed light on the question why criminologists are not used in the Criminal Justice System aiding other professionals to establish criminal capacity (Fouché & De Vos 2011a:96).

The researcher employed a semi-structured interview schedule. The predetermined questions were utilised to obtain the necessary information during the one-on-one interviews, as well as the focus group interviews. This method allowed the researcher to gain a detailed picture of the respondents' beliefs and views of the phenomenon in question, and guided the researcher rather than dictating the process (Greeff 2011:352).

1.6.2 Unit of analysis

The unit of analysis can be an individual, a group or an organisation. It is the specific objects or elements whose characteristics the researcher wishes to describe or explain and collect data from (Fouché & De Vos 2011a:93).

Fouché and De Vos (2011a:93) caution researchers that the unit of analysis needs to be carefully selected; otherwise the data may hold no relevance to the research. The unit of analysis in this study comprised various practitioners in the Child Justice System. Probation officers, prosecutors, magistrates, psychiatrists, psychologists, a Legal Aid advocate as well as social workers from an NGO all formed part of the unit of analysis in this study. All of these role players are involved in rendering services to the Child Justice System, or are directly involved in the criminal capacity assessment process.

The study was undertaken in the Western Cape where the researcher resides.

1.6.3 Sample size and design

There are two major groups of sampling procedures, namely probability and non-probability sampling (Strydom 2011b:228). In essence, probability sampling is based on randomisations, while non-probability sampling is done without randomisation (Strydom 2011b:228). Quantitative research relies more on probability sampling. However, in qualitative research, as in this study, the focus is on non-probability sampling.

The respondents in this study were selected by means of non-probability sampling, by applying purposive sampling. In purposive sampling a case is chosen because it illustrates explicit features of a particular study (Strydom & Delport 2011:391); in this study the role players in the Child Justice System. Purposive sampling, as Katzenellenbogen, Joubert and Karim (2004:179) rightfully argue, will ensure that the researcher covers the full range of possible candidates for the study.

In a qualitative study there are no rules for a sample size, and data can be collected from one or two cases (Strydom & Delport 2011:391). The sample size will depend on the purpose of the study and what the researcher needs to inquire about. However, it is important that qualitative samples are large enough to assure that most, or all of the information that might be important, is uncovered (Mason 2010). Saturation is reached when no new data have shed any further light on the issue under investigation. Three focus groups formed part of this study which consisted of 22 participants. Nine individual interviews were furthermore conducted.

1.6.4 Data collection

1.6.4.1 Literature review

Before attempting any form of data collection, it is important to consult available, existing data as a means of preparation for the data collection. In this regard Delport, Fouché and Schurink (2011:300) assert that a literature review assists in gaining a clearer understanding of the type and meaning of the research problem identified. Literature was consulted with regard to the research topic, and guided the researcher to compile the interview schedule. The interview schedule entailed a set of five questions that steered the researcher during the interview.

According to Esterberg (in Delport et al 2011:300), the researcher can come up with a well thought out research plan if he or she knows what previous researchers have already said about the topic. It is furthermore important to conduct a literature review to help place the current research in context.

Delpont et al (2011:302) point out that the literature review serves four broad functions in qualitative research. It will firstly demonstrate that the researcher is knowledgeable about related research. Secondly, it will highlight the gaps identified by the researcher in previous studies, and ensure that the proposed study will fill this need. Thirdly, as Rubin and Babbie (in Delpont et al 2011:302) state: “what better way to ensure that your study will be valued as part of a cumulative knowledge-building effort regarding that problem...than a literature study.” Lastly, it will demonstrate the underlying assumptions behind the general research questions (Delpont et al 2011:302).

1.6.4.2 Semi-structured interviews

Data were collected in two stages. It commenced with individual interviews with a prosecutor, a magistrate and two probation officers. Findings from the interviews were explored in more detail in phase two, during which three focus groups and six individual interviews were conducted.

A semi-structured predetermined set of questions was employed during the one-on-one interviews and focus group interviews to collect the data. This method was selected to ensure that all facts regarding the criminal capacity assessment process were collected during the study. The open-ended questions were based on the aims and objectives of the study, and allowed the research participants the opportunity to share their own experiences of the issue in question. This is important when the researcher wants to learn how the respondents think, and what is really important to them (Delpont & Roestenburg 2011:196). However, open-ended questions prompt an array of answers depicting richness and self-expression which can become problematic when the researcher attempts to categorise the information received (Delpont & Roestenburg 2011:196). Additionally, the researcher employed follow-up questions, which allowed her to gain more information about a response from a previous question (Delpont & Roestenburg 2011:201). As mentioned, focus groups as well as one-on-one interviews were conducted as a data collecting method.

1.6.4.3 Focus groups

Focus groups usually consist of six to 10 participants (Greeff 2011:366). However, according to Greeff (2011:366) the number of participants in focus groups will also depend on the research question. Participants are chosen based on their knowledge and relevance to the particular topic under study. In this study the researcher interviewed three focus groups that in total consisted of 22 participants.

One of the reasons why researchers choose focus groups as a data collection method, is to provide the researcher with a means of better understanding how people feel or think about an issue, product or service (Greeff 2011:360). Focus groups are also chosen because the group is 'focussed' and the participants have certain characteristics in common that relate to the topic of the focus group. The use of focus groups furthermore allows the researcher to investigate a multitude of perceptions in a defined area of interest, and provides the researcher with a range of ideas and feelings that the individuals have about the issue under investigation (Greeff 2011:360; Rabiee 2004:656), in this case the criminal capacity assessment procedure. The researcher encouraged free dialogue and participation throughout the study. In this study the use of focus groups also provided the researcher with the opportunity to gain the maximum in-depth data in a short period of time, which is one of the advantages of this method of data collection (Greeff 2011:360). Lastly, the sense of belonging to a group can increase the participants' sense of cohesiveness, help them to feel safer to share information, and create opportunities for more spontaneous responses (Onwuegbuzie, Dickinson, Leech & Zoran 2009:2).

1.6.4.4 The interview process

Appointments were arranged with the various practitioners in advance. Most of the interviews lasted between 60 and 90 minutes. Some of the individual interviews, as well as the focus group interviews, were conducted over a period of a week. The other one-on-one interviews were conducted over a period of time, some before the focus group interviews, and others after. All of the interviews were conducted when it was convenient for both parties, but the

researcher accommodated the respondents in every possible way to ensure that they were comfortable with the arrangements.

Data were collected with the consent of the participants as discussed later in section 1.7. This method allowed for a much fuller record than just taking notes during the interview (Greeff 2011:359). It also permitted the researcher to concentrate on how the interview was proceeding, as well as the non-verbal cues of the participants.

1.6.5 Data analysis

Data analysis is a process of bringing order, structure and meaning to a mass of collected data (Schurink, Fouché & De Vos 2011:397). In other words, data need to be organised, arranged and systematically prepared. Mouton (2005:108) refers to this process as the 'breaking up' of data into manageable themes, pattern, trends and relationships. According to Huberman and Miles (2002:309), qualitative data analysis is about detection, defining, categorising, explaining, exploring and mapping.

As Rabiee (2004:657) rightfully argue qualitative research, in particular focus-group interviews, may generate large amounts of data. The following steps suggested by Rabiee and Poggenpoel was utilised to analyse the data in this study.

According to Rabiee (2004:657), the process of focus-group data analysis begins during the data collection, which is essentially the first step. The researcher skilfully assisted the discussion in order to generate rich data (Poggenpoel 1998:342; Rabiee 2004:657). During the second stage the researcher familiarised herself with the data, which was achieved by listening to the recorded information several times (Rabiee 2004:657). The aim was to immerse in the details and get a sense of the interview as a whole before the researcher started to break it up into parts. During this phase the major themes began to emerge (Rabiee 2004:657).

The next step was to identify a thematic framework by making notes, writing short phrases, ideas and concepts arising from the texts and to develop

categories (Poggenpoel 1998:342). The next phase was to link the themes in a logical order to make sense in the context of scientific research. The deeper meanings of the data was assessed and integrated within the scientific knowledge gathered during the literature study (Poggenpoel 1998:342).

1.7 ETHICAL CONSIDERATIONS

Ethical approval for this study was firstly obtained from the College of Law Ethics Review Committee (Annexure C). Ethical considerations were upheld throughout the study, and all participants were informed of all the aspects of the research that might influence their willingness to participate. These issues are discussed in more detail in the section that follows.

Researchers are reminded by Strydom (2011a:113) that although the aim of any research is to yield maximum benefits or results, the primary purpose should always be to protect the human rights and dignity of the research participants. In social sciences the ethical issues can be complex, and data should never be obtained at the expense of the research participants. Maxfield and Babbie (2011:54) caution researchers that they should always aim to adhere to the highest possible ethical standards in a scientific inquiry.

In this regard Strydom (2011a:114) provides a detailed definition and defines ethics as:

A set of moral principles which is suggested by an individual group, is subsequently widely accepted, and which offers rules and behavioural expectations about the most correct conduct towards experimental subjects and respondents, employers, sponsors other researchers, assistants and students.

The following ethical guidelines, as proposed by the Belmont Report, guided the researcher in her study; respect for persons; beneficence; and justice. The ethical guidelines implemented in this study are discussed below.

1.7.1 Respect for persons

As pointed out previously, the Belmont Report states that respect for persons is one of the basic ethical principles of any research. This implies that the respondents have the right to know what the purpose of the study is, the right to be treated as autonomous agents, and the right to decide what shall and shall not happen to them (Strydom 2011a:117). The latter implies that the respondents have the option not to answer questions that they feel uncomfortable with, or they may withdraw from the study at any time.

1.7.2 Honesty and openness

Deception refers to 'participants being misled'. This occurs when information and facts are deliberately misrepresented, or when information is withheld from the participants or colleagues (Strydom 2011a:118). Researchers are ethically obligated to report the full findings of their research, and may not misrepresent or omit any data. This in turn will contribute to valid and reliable research (Strydom 2011a:126).

1.7.3 Avoidance of harm

Strydom (2011a:115) points out another important ethical concern, namely not to bring harm to any respondent. This is also in accord with the Belmont Report which states "do not harm" and "maximise possible benefits, and minimise possible harms". All research has an ethical obligation to protect participants within all possible and reasonable limits from any discomfort which may occur during the research project

1.7.4 Confidentiality

Participants in the study were asked to sign an informed consent form (Annexure A). The identities of all the participants were protected. Only the professions of the participants are made known as it is of relevance in the study to draw comparisons. Only the researcher and her supervisor, Prof. Schoeman, had access to the raw data accumulated during the research. Information gathered during the interviews was safeguarded by a password.

1.7.5 Informed consent

All participants in this study were informed about the purpose of the research (as addressed in 1.7.1), were allowed to ask questions, and were informed that they could withdraw from the study at any time. The voluntary nature of participation in this study, as well as the right to withdraw from the study, was fully addressed in the consent form. Participants were not compensated to partake in the study, although they may benefit in a professional manner as the outcome of this study can be utilised to improve problem areas within the Criminal Justice System.

1.7.6 Competency of the researcher

Researchers are ethically obligated to ensure that they are competent and skilled to undertake research of a sensitive nature (Schurink 1998:310). According to Schurink (1998:310), even well-intended and well-planned research can fail or produce invalid results if the researcher is not competent to conduct the research. The researcher is skilled in interviewing techniques due to the nature of her voluntary work at Brackenfell Police Station in the Western Cape. The research in this study was not of a sensitive nature.

1.7.7 Achieving valid results

To ensure valid results in this study, the researcher adhered to the following guidelines: relationships with the respondents stayed professional; findings were reported objectively; and no findings or data in this study were omitted. The following guidelines, as proposed by the Criminological and Victimological Society of South Africa (CRIMSA), were also adhered to:

- The highest possible standards.
- Recognise the limits of one's knowledge as this may affect the validity of the findings.
- Report all the findings of the study, and not misrepresent or omit any data.
- Report theories, methods and research designs that might have bearing upon interpretation of the research findings.

- Provide adequate information, documentation and citations, as well as conserving scales and other measures in their research.
- Honour commitments. This principle suggests that researchers should always arrive on time, and honour scheduled interviews.

1.8 VALIDITY AND RELIABILITY

Validity and reliability are essential in any form of research. Although they are related concepts, they are defined quite differently (Ellis, Hartley & Walsh 2010:24). According to Davies et al (2011:172), not only is good research valid research, it is also “the design of research that will provide credible conclusions”.

Validity is concerned with whether a measure accurately reflects the concept it is designed to measure (Davies et al 2011:355). Reliability refers to the degree or extent of the planning of the research, and the explanations offered in order to replicate the findings and the confirmation thereof (Davies et al 2011:355).

However, in qualitative research there’s no expectation of the replication of findings, as the intention of the study is not to generalise the findings. Nevertheless, validity and reliability are essential in any form of research and should be addressed in all studies, whether quantitative or qualitative (Simon 2011). To ensure reliability in qualitative research, examination of trustworthiness is crucial. It is an important factor as the dependability and credibility of the information depend on it (Golafshani 2003:601). While establishing good quality studies through reliability and validity in qualitative research, “trustworthiness of a research report lies at the heart of issues conventionally discussed as validity and reliability” (Golafshani 2003:601). To ensure the trustworthiness of this study, direct quotations of the participants were used.

Although there are other models to utilise in qualitative research, Guba’s model is well developed and has been applied by many South African researchers (Poggenpoel 1998:348). The researcher therefore deemed it an important factor, because the model is well tested and appropriate to be utilised in this

study. Poggenpoel (1998:348) refers to four aspects that are relevant to ensure trustworthiness, which are truth-value, applicability, consistency, and neutrality.

- Credibility is the criterion of truth value.
- Transferability is the criterion of applicability.
- Dependability is the criterion of consistency.
- Conformability the criterion of neutrality.

Truth-value asks whether the researcher has established confidence in the truth of the findings for the subjects and the context in which the research was undertaken. Applicability in qualitative research refers to whether it is fitting or transferable, although in this case it is not the researcher's intention to generalise the findings of the study. Consistency considers the consistency of the data, for example whether the findings would be consistent if the enquiry was replicated with the same subjects or in a similar context. Lastly, neutrality refers to the degree to which the findings are a function solely of the informants and conditions of the research and not of other biases, motivations and perspectives (Poggenpoel 1998:348).

1.9 DEFINITIONS OF KEY CONCEPTS

1.9.1 Child

The CJA (Act 75 of 2008) defines a child as “any person under the age of 18 years, and in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2)”.

1.9.2 Assessment

The CJA (Act 75 of 2008) defines assessment as the “assessment of a child by a probation officer in terms of chapter 5”.

The Probation Services Amendment Act (Act 35 of 2002), defines assessment as developmental assessment. In other words “an evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding

the alleged commission of an offence, its impact on the victim, the attitude of the alleged offender in relation to the offence and any other relevant factors”.

For the purpose of this study, criminological assessment in the context of assessing the criminal capacity of a child in conflict with the law, can be defined as a holistic, individualistic process that includes various factors such as: the child’s age; age when the crime(s) was committed; criminal history; background information; social interactions (peers and gang involvement); life-style; environmental influences; scholastic performance; motive(s); trigger factors; and contributory factors (by adults) that were central to his or her offence; psychological make-up (inclusive of coping skills, problem-solving skills, attitude, victim empathy and any indications of psychological disorders); substance abuse record; culture; prospects of rehabilitation; future dangerousness to society; and the risk of re-offending. All of the aforementioned factors are based on sound scientific knowledge of criminal behaviour and tested theories which can be applied in a multi-cultural setting.

1.9.3 Criminology

In their classic definition, Edwin Sutherland and Donald Cressey (in Siegel 2010:4) define criminology as “the body of knowledge regarding crime as a social phenomenon”. It includes within its scope the processes of making laws, of breaking laws, and of reacting toward the breaking of laws. The objective of criminology is the development of a body of general and verified principles and of other types of knowledge regarding the process of law, crime and treatment (Siegel 2010:4).

The term criminology refers to an inter-disciplinary scientific study that includes, but is not limited to the causes and explanations of specific types of crime and victims, the adjudication of crimes, and crime prevention (Beukman 2005:15), it also includes the analyses, evaluation, understanding and explanation of crime and criminal behaviour in all its facets (Hesselink-Louw 2004:22). The objectives of criminology is the development of a body of general and verified principles and of other types of knowledge, regarding the process of law, crime, and treatment (Siegel 2009:4).

As an operational definition, criminology is defined as an interdisciplinary science with a lengthy history of researching all facets of crime and criminal behaviour and the origins thereof, utilising sound theoretical applications to derive at conclusions, predictions and practical applications in order to address criminal behaviour in both children and adults.

1.9.4 Criminologists

“A criminologist is one whose professional training, occupational role and financial reward are primarily concentrated on a scientific approach, the study and analysis of the phenomenon of crime and criminal behaviour” (Siegel 2010:10). Hesselink-Louw (2004:33) defines a criminologist as a skilled expert in the analysis, examination, evaluation, assessment and explanation of crime and criminal behaviour, who possesses a sound balance between theoretical knowledge and practical experience related to criminal behaviour.

A criminologist is a professional who studies crime, criminals, criminal behaviour and who attends to determine the causes of crime (Brown, Esbensen & Geis 2010:3). Beukman (2005:16) further describes a criminologist as a person studying specific crimes with the purpose of crime prevention, victims for the purpose of assistance by preparing victim impact statements and offering debriefing, and by studying the assessment of offenders to determine criminal capacity, rehabilitation and suitable sentencing options.

The operational definition in this study defines a criminologist as an expert in the field of crime and criminal behaviour, and the explanation thereof, based on sound scientific knowledge and a practical execution thereof, which qualify the practitioner to examine, evaluate, explain and profile crime and criminal behaviour, and apply these practical skills within the Child Justice System assessing children in conflict with the law.

1.10 OUTLINE OF THE STUDY

The research is compiled in a systematic structure to familiarise and guide the reader through the study. A summary of the content of the chapters is outlined and discussed below.

Chapter 1: This chapter serves as an introduction into the study and provides the reader with a general overview and orientation of the study. The chapter furthermore provides a research question, as well as the aim and objectives of the study. It clarifies the data collection methods employed, the data analysis utilised in the study, as well as the importance of research ethics.

Chapter 2: This chapter focuses on literature pertaining to the key objectives of the CJA, current trends in reviewing the age of criminal capacity, national and international trends pertaining to criminal capacity, the process to determine criminal capacity and the role players involved in the process. It furthermore expands on the various factors that could influence a child's ability to possess criminal capacity, and lastly proposes a role and function that criminologists could play in the Criminal Justice System.

Chapter 3: In chapter 3, the researcher introduces theories utilised by criminologists during assessment to explain crime and criminal behaviour. Assessment from a criminological departure point is discussed, and the various factors that could affect a child's ability to possess criminal capacity are explored and explained in more detail.

Chapter 4: The qualitative data findings collected are presented and discussed. The researcher systematically interprets the findings according to the aim and objectives of the study.

Chapter 5: The final chapter serves as a closing chapter. The findings according to the aim and objectives of the study are discussed. Limitations are pointed out and recommendations are proposed for further research based on the findings of the study.

1.11 CONCLUSION

In South Africa, where crime is rife, the Criminal Justice System is overburdened with responsibilities. As set out by the CJA, every possible solution should be explored and utilised to uphold the best interest of the child. A severe shortage of social workers, psychologists and psychiatrists in the Criminal Justice System could hamper and influence the effective functioning of the system, and could

cause delays. The Constitution of the Republic of South Africa (Act 108 of 1996) stipulates that the best interest of the child is of paramount importance, and offers a protective mantle in this regard for all children in conflict with the law. This, unfortunately, can only be successfully executed if ample role players are available and adequately trained to effectively deal with all issues in question pertaining to children in conflict with the law.

CHAPTER 2

CONTEXTUALISING THE CRIMINAL CAPACITY ASSESSMENT OF CHILDREN IN CONFLICT WITH THE LAW

The debate should not be about right and wrong, and at what age a child knows the difference between right and wrong, but what is the right thing to do in relation to children of a particular age (Smith & Brownless 2013:4).

2.1 INTRODUCTION

Even though children are amongst the most vulnerable members of society, up until the enactment of the CJA (Act 75 of 2008) on 1 April 2010, children were prosecuted under the same legislation utilised for adults, namely the Criminal Procedure Act (Act 51 of 1977) (Gallinetti 2006:7). Harsh procedures in this Act resulted therein that some basic fundamental human rights of child offenders were ignored. For example, parents or guardians of children were not contacted when children were arrested or detained; no pre-trial assessments were conducted; and only a few attempts were made to divert children away from the Child Justice System (Badenhorst 2011:3). In addition, no legal assistance was provided to children; no contact with parents was allowed while children were detained; and no information about the charge(s) was supplied to the parents. While in police custody, children were furthermore subjected to physically rough and intimidating interrogations by the police (Doek 2006:14). Although youth centres (previously known as reform schools) were intended for children who had committed crimes of a serious nature, some children were sent there for minor offences such as petty theft, due to a lack of other appropriate facilities (Skelton 2006:70).

Before the implementation of the CJA, the criminal capacity of children in conflict with the law was established by merely asking the parent(s) whether the child knew the difference between right and wrong, and if the child had been taught the difference (Skelton & Badenhorst 2011:15; Skelton & Tshehla 2008:43). According to Skelton and Tshehla (2008:43), the focus was purely placed on

the child's cognitive ability, while the conative ability of a child was ignored. The cognitive ability focuses on whether the child is presumed to understand the difference between right and wrong, while the conative ability is associated with whether children are able to control and have insight into their behaviour, as well as having the ability to act accordingly (Skelton & Badenhorst 2011:15; Skelton & Tshehla 2008:43). In light of the current provisions set out by the CJA, which focus on all the developmental factors of a child's development during criminal capacity assessment, it can be argued that the previous methods utilised were unjust and undoubtedly not beneficial for children in conflict with the law.

Although some assessments were conducted by probation officers, there were no legal requirements for compulsory assessment of arrested children, and many children were released by the police before being assessed at all (Gallinetti 2006:10; Kassan 2006:93). These practices resulted in gross human rights violations to the most vulnerable members of society, and deprived them of much needed interventions that could for example have prevented further offending. During the 1970s and 1980s, thousands of young people were detained, and no strategy was in place to ensure that children were treated humanely and with adherence to just principles (Skelton & Tshehla 2008:32).

During the 1990s, the need to protect the rights of children in conflict with the law, and the development of a separate Child Justice System in South Africa, came to the fore (Badenhorst 2011:1; Gallinetti, Kassan & Ehlers 2006:8). Awareness was raised both nationally and internationally by various NGOs to emphasise the difficult conditions children were facing when they came in conflict with the law (Skelton & Gallinetti 2008:4).

It is widely believed that the death of Neville Snyman aged 13 in 1992, became the turning point for movements working towards reform of South Africa's juvenile justice system (Gxubane 2010:35; Le Roux 2004:1; Skelton [sa]:41). Neville and his friends broke into a shop in Robertson and stole sweets and cold drinks. He was beaten to death while being detained in a police cell with offenders up to the age of 21 (Skelton [sa]:41). The death of Neville illustrated the consequences of the absence of a legislative framework providing for the

unique circumstances of child offenders, which subsequently led to rigorous advocacy for the reform of the Child Justice System in South Africa (Gxubane 2010:35).

With South Africa's ratification of the 1989 United Nations Convention on the Rights of the Child (UNCRC) on 16 June 1995, additional pressure was placed on South Africa to establish laws, procedures and institutions which could address and protect children who came into conflict with the law (Badenhorst 2011:2; Gallinetti et al 2006:8). The UNCRC is premised on the 'best interest of the child' principle and its applications must be upheld in all aspects concerning the child in conflict with the law (Gallinetti 2009:10). The UNCRC is furthermore complemented by relevant international standards such as the United Nations (UN) Guidelines for the Prevention of Juvenile Delinquency (the 'Riyadh Guidelines'), the UN Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules') and the UN rule for the Protection of Juveniles Deprived of their Liberty (Gallinetti 2009:10).

The recognition of past injustices in South Africa, as well as the ratification of the UNCRC as aforementioned, contributed to the adoption of the current Constitution of the Republic of South Africa (Act 108 of 1996), on 8 May 1996. In addition, a renewed focus to develop a separate Child Justice System became a core concern (Badenhorst 2011:2).

Numerous developments have taken place since 1994 which improved child justice in South Africa. Corporal punishment as a sentencing option was abolished, the use of detention of children awaiting trial was minimised as far as possible, and diversion options for offenders were introduced (Badenhorst 2011:5). Additionally, the importance of individual assessment of children in conflict with the law was recognised and incorporated in the system (Badenhorst 2011:5). South Africa furthermore had to review the minimum age of criminal capacity, as it was found to be set too low at seven years. A child-centred approach was adopted; the best interest of the child became of paramount importance and had to be enforced in all decisions relating to a child in conflict with the law (Skelton & Badenhorst 2011:17).

Although remarkable improvements have been noted in the protection of the rights of children in conflict with the law since the enactment of the CJA in 2010, questions still remained about whether the minimum age of criminal capacity should be raised or not. As will be discussed in more detail later in this chapter, pressure was placed on government by civil society organisations to raise the age of criminal capacity to 12 years before the enactment of the CJA. Even though these attempts were not successful, the CJA stipulated that this decision should be reviewed not later than five years after the CJA had become operational. This would also create the opportunity to evaluate if the process used to determine criminal capacity was indeed in the best interest of children in conflict with the law.

For the purpose of this study, emphasis will be placed on the designated role players assigned by the CJA to conduct criminal capacity assessments. It is argued in this study that the current provisions of the CJA (Act 75 of 2008 section 11(3)), whereby criminal capacity assessments can only be done by suitably qualified persons, namely psychiatrists or clinical psychologists who are registered under the Health Professions Act (Act 56 of 1974), do not take into account the multi-dimensional and psycho-social realities associated with determining criminal capacity.

A discussion of the amendment of the age of criminal capacity and the current trends in determining criminal capacity will be included in this chapter. In addition, focus will be placed on the key objectives of the CJA, as well as the international and African trends on the minimum age of criminal capacity. The process followed to establish the criminal capacity of children in conflict with the law will be highlighted, as well as the functions of role players involved in this process. The key objectives of the CJA will be discussed henceforth.

2.2 THE KEY OBJECTIVES OF THE CJA

The primary objectives of the CJA are to establish a criminal justice process that protects the rights of children under the age of 18 who come into conflict with the law. It aims to break the cycle of crime while promoting the spirit of Ubuntu in the Child Justice System (Le Roux 2004:15; Wakefield 2011:45). It

furthermore aims to minimise children's contact with the justice system, and to use detention only as a measure of last resort for the shortest appropriate period of time (Department of Justice and Constitutional Development 2010a:14).

The CJA similarly promotes and accentuates the imposition of non-custodial sentences, rehabilitation, diversion and the re-integration of children into society in order to reduce the incidence of recidivism (Department of Justice and Constitutional Development 2010a:14; Terblanche 2013:1). Entrenched in the CJA are the principles of restorative justice, while still ensuring that children are held responsible and accountable for crimes committed, though balancing the interest of the child offender, society and the victim (Department of Justice and Constitutional Development 2010a:14; Skelton & Tshehla 2008:9). Special processes or procedures for children in conflict with the law were created in order to ensure that the best interest of the child is recognised and considered in all decisions taken (Department of Justice and Constitutional Development 2010a:14).

This, for example, can be seen in the provisions of the CJA, which firstly raised the minimum age of criminal capacity from seven years to 10 years, and in addition ensured that assessment took place for all children who came into conflict with the law. Provisions in the CJA were furthermore put in place to secure the attendance of children in court, which additionally regulated the release, detention or placement procedures (Department of Justice and Constitutional Development 2010a:14). To facilitate the best interest of the child, an inquisitorial, pre-trial procedure was introduced which ensures that all decisions taken during the proceedings would consider the best interest of the child. Lastly, a wide range of sentencing options specifically suited to the needs of children became available (Department of Justice and Constitutional Development 2010a:14). The CJA's recognition of the need to give special protection to children who are presumed not to have criminal capacity, is of relevance in this study.

2.3 THE AGE OF CRIMINAL CAPACITY BEFORE THE CJA

To fully appreciate the progress that has been made in the field of criminal capacity, and to contextualise current developments, it is important to provide a brief overview of child justice and the minimum age of criminal responsibility prior to the enactment of the CJA in April 2010.

In the CJA the minimum age of criminal capacity refers to the youngest age at which a child can be charged with and found guilty of a crime; in South Africa, for example, it is 10 years. Before the enactment of the CJA South Africa used to have one of the lowest minimum ages of criminal capacity in the world (Skelton & Tshehla 2008:42). Children under the age of seven years were irrebuttably presumed to lack criminal capacity and could therefore not be prosecuted. Children between the ages of seven years and older, but under 14 years, were rebuttably presumed to lack criminal capacity (*doli incapax*), with the onus of proof being the responsibility of the State, while children between the ages of 14 and 18 years were presumed to have criminal capacity (Skelton 2013:257; Badenhorst 2011:3).

With the drafting of the Child Justice Bill (Act 75 of 2008) the South African Law Reform Commission proposed three options for the criminal capacity review of children in conflict with the law. Firstly, to retain the common law rule that a child who is 10 years old, but has not yet turned 14 years, is presumed to be *doli incapax*, with additional measures to ensure that children are protected. Secondly, to discard the *doli incapax* presumption, and set a minimum age of prosecution not linked to the actual criminal capacity of children. Lastly, setting a general minimum age of prosecution but with certain exceptions to the rule for crimes such as murder and rape (Skelton & Badenhorst 2011:15).

Submission was also made in February 2003, by various NGOs and individuals who advocated for the minimum age of criminal capacity to be set at 10 years (Skelton & Badenhorst 2011:15). A new version of the Child Justice Bill was published in 2007 and introduced in January 2008. Public hearings commenced early February 2008, after the publication of the amended Child Justice Bill in 2007. During this period several NGOs and individuals presented written and

oral submissions on various aspects of the new version of the Bill (Skelton & Badenhorst 2011:15). The majority of submissions at that stage supported a minimum age of 12 years, and argued that any age below 12 is not internationally acceptable.

On 12 March 2008, the Portfolio Committee tentatively settled on 12 years, however on 17 June 2008 the minimum age of criminal capacity was set at 10 years (Badenhorst 2011:2; Skelton & Badenhorst 2011:15). The Portfolio Committee argued that they could not raise the minimum age to 12, for two reasons. Firstly, there were no reliable or accurate statistics that reflected the situation regarding the types of offences committed, and secondly there were no statistics available on the number of children between the ages of 10 and 13 who came into conflict with the law (Skelton & Badenhorst 2011:18).

A compromise was reached, and Parliament decided that they will again consider raising the minimum age of criminal capacity at a later stage. As mentioned earlier, section 7(1) of the CJA (Act 75 of 2008) determined that:

In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the administration of justice must, not later than five years after the commencement of this section, submit a report to Parliament, as provided for in sections 96 (4) and (5) (Skelton & Tshehla 2008:43).

Since the CJA commenced on 1 April 2010, the deadline for the review will thus be in 2015.

2.4 CURRENT TRENDS IN REVIEWING THE AGE OF CRIMINAL CAPACITY

As mentioned in the previous section, the most pertinent development with the enactment of the CJA was to raise the age of criminal capacity from seven to 10 years. Section 7 of the CJA (Act 75 of 2008) dictates the provisions currently applicable to determining the age of criminal capacity, and reads as follows:

7(1) a child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9.

7(2) a child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity in accordance with section 11.

7(3) the common law pertaining to the criminal capacity of children under the age of 14 years is hereby amended to the extent set out in this section.

The provisions as set out in section 7(1) of the CJA essentially mean that a child below the age of 10 lacks criminal capacity (*doli incapax*), and is therefore presumed not to possess the mental ability to distinguish between right and wrong and to understand the consequences of his or her actions. A child below the age of 10 years can therefore not be arrested or prosecuted for any offence but must be dealt with in accordance with section 9(1) (a-b) of the CJA.

Section 9(1) (a-b) necessitates firstly that a member of the SAPS notify a probation officer, and secondly that a child immediately be handed over to his or her parents or appropriate guardian. Additionally, after a probation officer has received a notification from a police official, the aforementioned sections in the CJA require that the child be assessed for purposes of developing a care plan. After assessment, a probation officer may, in terms of section 3 (a) (i-vi), refer the child for counselling or therapy, or refer the child to an accredited programme. A probation officer can also arrange for support services, or decide not to take any action. It is important to note that according to section 9 (3) (b) of the CJA these actions taken do not imply that the child is held criminally liable for his or her actions.

The provisions in section 7(2) of the CJA provide protection for children between the ages of 10 and 14 years, as it recognises the possible difference in the level of maturity and development of children who fall within this age group (McGregor 2010:23). Between the ages of 10 and 14 years, children are

presumed to lack criminal capacity but it is a rebuttable right. This implies that if the State decides to prosecute a child, they will have to prove beyond reasonable doubt that the child possesses the capacity to appreciate the difference between right and wrong (cognitive ability), as at the time of the alleged offence, and secondly that he or she could act in accordance (conative ability) with that appreciation (Badenhorst 2006:39). In cases where criminal capacity was proven beyond reasonable doubt, these children may be prosecuted or diverted in the manner as prescribed by the CJA. In cases where children do not have criminal capacity, section 9 of the CJA provides probation officers with certain discretionary powers as discussed previously.

Section 11 of the CJA states that children older than 14 years, are presumed to have full capacity. However, the defence may rebut the presumption that the child possesses criminal capacity, but the onus of proof lies with them. A discussion will now follow on the international and African trends currently exercised with regard to the minimum age of criminal capacity.

2.5 THE INTERNATIONAL AND AFRICAN POSITION ON THE AGE OF CRIMINAL CAPACITY

In Article 40(3)(a) the UNCRC requires of State parties to establish a “minimum age below which children shall be presumed not to have the capacity to infringe the penal law”. The UN Standards Minimum Rules for the Administration of Juvenile Justice (1985) add to this principle that “the beginning of that age shall not be fixed too low” (Urbas 2000:2). Although the UNCRC does not specify what age level is appropriate, they do require that factors such as the emotional, mental and intellectual maturity of the child be taken into consideration (Urbas 2000:2).

There is currently large variation around the world on what the appropriate age is, and in some countries it even depends upon the nature of the crime and the jurisdiction of the country (Urbas 2000:2). The researcher has selected a range of international as well as African countries to demonstrate the diversity amongst the countries with respect to the minimum age of criminal capacity. Australia, England, Wales, Ireland, Scotland, Canada, France, Germany and

Italy as well as African countries such as, Kenya, Botswana, Lesotho, Swaziland, Nigeria and Ghana will form part of the discussion below.

2.5.1 International trends

In England, Wales and Australia children are believed to have criminal capacity at the age of 10, and all of these countries abolished the *doli incapax* presumption (Hazel 2008:33; Lipscombe 2012:2). In 2006 Ireland raised their minimum age of criminal capacity from seven to 12 years, however, they also abolished the rebuttable presumption of *doli incapax* (Skelton & Badenhorst 2011:9). Consent is, however, required of the Director of Public Prosecutions before any child under 14 years can be charged with an offence (Skelton & Badenhorst 2011:9). In Scotland children between the age of eight and 12 are presumed to have criminal capacity, but cannot be prosecuted in a criminal court, and are referred to the hearing system (Hazel 2008:33). The hearing system seeks to determine what measures may be required to address the behaviour and welfare of the child. The focus of intervention in Scotland is on the welfare of the child, rather than emphasising the responsibility of the child or the involvement of punishment (Hazel 2008:33).

In Canada the minimum age is set at 13 years, and in France it is 14 years. In France and Italy there is a presumption of incapacity up to the age of 18 years (Hazel 2008:33), which is quite remarkable taking into account that most countries still tend to prosecute children at an extremely low age. Germany and Italy set their minimum age at 15 years, except for murder and manslaughter (Hazel 2008:33). This is in contrast with how England and Wales deal with young offenders. England and Wales for example sentence more children than any country in the rest of Europe (Lipscombe 2012:4). Countries such as France, for example, look for alternatives to prosecution and employ educational interventions (Lipscombe 2012:4).

Skelton and Badenhorst (2011:10) argue that raising the age of criminal capacity to 12 years in countries such as Scotland and Ireland, still has not provided sufficient protection for children in conflict with the law. In countries where the *doli incapax* presumption has been abolished, all children are treated

in the same manner, not taking into account their individual development (Lipscombe 2012:4; Skelton & Badenhorst 2011:10). However, as mentioned previously, it is important to consider that Scotland employs a welfare system, and almost no young person is prosecuted through the criminal courts.

The differences in how the aforementioned countries deal with children in conflict with the law, are apparent in the system they chose to employ. According to Hazel (2008:23), two systems are in operation around the world, namely the welfare and the justice system. Essentially, the two models originate from the Classical School and Positivism in criminology (Hazel 2008:23). The premise of the Classical School is to lay the blame for behaviour firmly with the offender and their choices, and to punish the offender proportionately. Positivism in contrast, highlights factors bearing on the offender, and supports a welfare approach aimed at treating the origins of the behaviour. According to Sloth-Nielsen (in Skelton & Tshehla 2008:8), the welfare approach also coincides with the rise of behavioural sciences such as social work and psychology.

The justice model assumes that all individuals are reasoning agents who are fully responsible for their actions and should be held accountable. According to the justice system, the task of the justice system is to assess the degree of culpability of the individual offender and to find a suitable punishment in accordance with the seriousness of the offending behaviour (Hazel 2008:23).

In contrast, the welfare model proposes treatment rather than punishment, and argues that any criminal action of the child can be attributed to dysfunctional elements in their environment (Hazel 2008:23). The task of the justice system is to identify, treat and cure the underlying social causes of offending (Hazel 2008:23; Murphy, McGinness & McDermott 2010:3). According to Murphy et al (2010:3), there is a significant difference between international juvenile systems. The majority of English-speaking countries, for example, operate within a justice model, holding young people accountable for their actions. In contrast other countries, generally in Europe, tend to employ a welfare-based model characterised by the informality of proceedings and interventions (Murphy et al 2010:3). Rates of young people in detention generally reflect the

principles and operation of a country's youth justice system. Countries that operate under the 'justice model', which emphasises accountability and punishment, report high incarceration rates (Hazel 2008:31).

A new approach has begun to dominate the Child Justice System, namely restorative justice. The restorative justice theory aims to go beyond the oppositional debates of welfare vs. justice, or utilitarian vs. retributive (Skelton & Tshehla 2008:9). The notion behind the restorative justice theory is that all participants in the justice process deserve to be treated humanely and in a manner that respects their dignity (Skelton & Tshehla 2008:9). Equally important is to make children understand the impact their behaviour had on the victims, and to amend the damage caused as far as possible (Skelton & Tshehla 2008:9).

Although it is important to adhere to the Beijing Rules (Rule 4), which strongly recommend that State parties "should not allow, by way of exception, the use of a lower age for serious offences", it is also important to consider the interventions employed once the child enters the Criminal Justice System, as discussed previously. Lipscombe (2012:4) argues that problematic behaviour in children is not a criminal justice issue, but should be regarded as a welfare problem and addressed as such. In other words, risk factors that may compel certain children to commit crimes should be addressed at an early age by social services, and not only when the child enters the Criminal Justice System. In this regard it is essential that South Africa eradicate the current shortage of social workers.

Children are entitled to a range of child-specific rights as set out by the UNCRC, which recognises their young age, dependency and evolving capacity (Smith & Brownless 2013:7). It is often regarded that if a society views problematic behaviour through a welfare lens, recognising the needs of children in conflict with the law, the higher the age of criminal capacity will be set. Smith and Brownless (2013:4) argue that the focus of a justice system should be on 'how and why' the child has fallen through the welfare net, and not criminalising the child. "The debate should not be about right and wrong, and at what age a child knows the difference between right and wrong, but what is the right thing to do

in relation to children of a particular age” (Smith & Brownless 2013:4). Allowing children to develop to a stage where they enter the Criminal Justice System can be regarded as an infringement of their basic human rights. The Constitution of South Africa states in section 28(1) (c) and (d) that a child has a right to basic nutrition, health services, shelter and ***social services and the right against maltreatment and neglect*** [my emphasis]. In other words, it puts the State under an obligation to act positively towards the fulfilment of this particular right. It is not satisfactory to ‘try’ and rectify this ‘right’ only once the child enters the Criminal Justice System.

The trends followed by African countries will now be discussed and a comparison will be drawn between these countries.

2.5.2 African trends

In the previous discussion, it became evident that there is large variation amongst international countries regarding the minimum age of criminal capacity. Shifting the focus to Africa, a comparison between countries such as Swaziland, Kenya, Botswana, Nigeria, Lesotho and South Africa will highlight their diverse approach concerning the minimum age of criminal capacity and how children are dealt with within the Criminal Justice System.

Swaziland still has one of the lowest minimum ages of criminal capacity set at seven years (Anon 2013a). However, in Swaziland, the *doli incapax* still provides some protection for children in that they can only be held liable for an offence between the age of seven and 14 years if criminal capacity can be proven by the State beyond reasonable doubt. In Kenya and Botswana the minimum age of criminal capacity is eight years, and except for the difference of one year between Kenya, Botswana and Swaziland, the minimum age is still at an unacceptably low age according to the recommendations set out by the UNCRC standards (Anon 2013a). The *doli incapax* presumption is still in operation in Kenya, and children between the age of eight and 12 are presumed to lack criminal capacity, unless proven (Anon 2013a). In Botswana a child is presumed to lack capacity between the ages of eight and 14 years. Both Kenya and Botswana presume that a male child under the age of 12 years is incapable

of having carnal knowledge and cannot be prosecuted for any sexual offences in these countries (Anon 2013a).

In Lesotho the minimum age of criminal capacity is set at 10 years, (Department of Justice and Constitutional Development 2010b), corresponding with the current trend in South Africa. Children between the ages of 10 and 14 years are still presumed to lack criminal capacity and can only be prosecuted if criminal capacity is proven, as in the case of Swaziland, in other words the *doli incapax* presumption is also still maintained in these countries (Anon 2013a).

It is challenging to compare the minimum age of criminal capacity in Nigeria with other countries, whether national or international. The minimum age of criminal responsibility varies among Nigerian states, and the legal system in Nigeria is a mixture of Islamic law, English common law and customary law (Ijaiya 2009:3). Factors such as the definition of a child, the minimum age of criminal capacity, the eligibility of child offenders for capital punishment, corporal punishment and life imprisonment, all vary in the different laws (Ijaiya 2009:3).

There are for example eight major schools of thought within Islamic law, and they hold diverse viewpoints on the questions of a child's age and criminal responsibility (Smith & Brownless 2013:5). Most Islamic schools consider a child to be criminally liable when he or she has attained puberty. Boys are considered to have reached puberty when they produce sperm, and girls upon their first menstruation (Smith & Brownless 2013:5). In almost all cases, Islamic law breaches international standards regarding gender discrimination, because they explicitly assign criminal capacity on the basis of puberty. Girls normally reach puberty much earlier than boys (Ijaiya 2009:3; Smith & Brownless 2013:5), which provides another example of how children's rights to be treated fairly, considering their developmental needs and their evolving criminal capacity, are violated by countries such as Nigeria.

Another distinction is also made between Muslims and non-Muslims, who are tried in different courts (Ijaiya 2009:3). Sharia laws apply only to Muslims in the Sharia northern states, and only Muslims are tried in Sharia courts (Ijaiya 2009:3). Non-Muslims are generally tried in magistrates and high courts under

the common law system, though they may also voluntarily be tried under Sharia law. In Kaduna and in the south, non-Muslims may also be tried in customary courts (Ijaiya 2009:3).

In Nigeria, the Federal Children's Rights Act 2003 requires that the law deals with the child who came into conflict with the law under the Act (Ijaiya 2009:3). However, the Act does not specify a minimum age of criminal responsibility, but it does define a person under the age of 18 years as a child (Anon 2013a). In contrast, the Children and Young Persons Law defines a child as a person under 14 years and a young person between the ages of 14 and 16 years. It does set a minimum age of criminal capacity at seven years, but also requires that a child below seven, who had allegedly committed a crime, be brought before the Juvenile Court (Anon 2013a). Children older than 16 years are treated and tried as adults.

Ghana was the first country to ratify the UNCRC within the first year of its adoption (Ramages 2008:7). Ghana implemented a separate Act in 2003 to deal solely with child justice issues in order to protect the rights of children as well as the rights of young offenders (Ramages 2008:7). They increased the minimum age of criminal responsibility from seven to 14 years, which constitutes a positive step in complying with the provisions of the UNCRC (Ramages 2008:7).

When a comparison is drawn between Ghana, which is considered a third world country, and first world countries such as England, Wales and Australia, they do exhibit remarkable progress regarding the minimum age of criminal capacity in their endeavour towards the protection of the rights of children in the Child Justice System. This unfortunately cannot be said about countries such as Kenya, Botswana, Nigeria and Swaziland, as discussed above. In spite of international pressure and pleas to raise the minimum age of criminal capacity to an acceptable level, they still prosecute children as young as seven. However, as previously mentioned, the presumption of *doli incapax* that is still operational, and the fact that in some of these countries the welfare model is operational, do provide some form of protection for children in conflict with the law.

It is furthermore important to remember, although children might have the requisite capacity to be held responsible for offending behaviour, it does not mean that children over the age of criminal responsibility should be subjected to adult-oriented, formal criminal prosecutions (Anon 2013b), as observed in a country such as England. A separate justice system, designed to attend to the needs of children in conflict with the law, is central to the protection of vulnerable children and should be enforced on all countries.

Anon (2008:3) points out that youth crime has become an increasingly political issue, especially in countries such as the United Kingdom and the United States, which makes it difficult to develop international standards that will be complied with universally. It is furthermore evident that customary laws and religion, still practised in many African countries, do play an important role in the countries' legislation.

Attention will now be paid to the process followed to determine criminal capacity in South Africa and the role players involved in the process.

2.6 THE PROCESS FOLLOWED TO DETERMINE CRIMINAL CAPACITY OF CHILDREN IN CONFLICT WITH THE LAW

The CJA requires in section 34 that all children who are alleged to have committed an offence be assessed, and that a probation officer gets notified as soon as a member of the SAPS apprehends a child. The necessity of pre-trial assessment was first raised at an International Conference on Juvenile Justice Reform held in 1993, and was first introduced in the Western Cape (Gallinetti 2009:33). The intent of the legislature was to individualise each child, taking into consideration his or her unique circumstances that gave rise to the alleged offence, providing a 'protective mantle' to consider the child's level of maturity and development during assessment (Gallinetti 2009:18). These provisions set out by the CJA can be regarded as progressive towards the protection of children's rights. As indicated, before the CJA children were prosecuted under the same legislation utilised for adults (Gallinetti 2006:7), where none of the current provisions set out in the CJA provided a 'protective mantle'.

The assessment process is set out in section 35 of the CJA. The provisions in section 35 require that probation officers uphold the purpose of assessment, which is firstly to determine a child's age and secondly to express a 'view' on the criminal capacity of the child, if the child is between the ages of 10 and 14 years. Section 35 furthermore requires that information is collected concerning any previous convictions and diversions, as well as charges pending against the child. The probation officer should also establish the possibility of diversion and formulate recommendations regarding the release, detention and placement of the child in question. As mentioned previously, it is additionally important to evaluate if any child is in need of care or protection, and to determine measures that need to be taken if a child is below the age of 10, as stipulated by the CJA. Two of the objectives, namely determining the age of the child and expressing a view on the criminal capacity of the child, will now be discussed in detail.

2.6.1 Determining the age of the child and the role players involved in the process

The first step in criminal capacity assessment is to accurately determine the age of a child who is presumed to have committed an offence. Determining the age of a child may become problematic for a number of reasons. Many children, and even in some cases parents of child offenders in South Africa, do not know their exact age, and it is estimated that only 40 per cent of births are registered (Gallinetti 2009:17). In some instances children may even deliberately not disclose their correct birth age due to fear of prosecution (Skelton & Tshehla 2008:44).

The age of the child is an important aspect in determining the criminal capacity of the child in conflict with the law (Badenhorst 2006:138). It is important to accurately identify a child's age since it will allow the child to receive the care as intended by the CJA. If a child below the age of 10, for example, is mistakenly identified as older, the child will enter the CJA when he or she should have been entitled to special care and protection (Smith & Brownless 2013:1).

Similar to the implementation of the CJA being dependent on close collaboration between respective government and civil society partners, so too is the determination of a child's age and criminal capacity. The role players involved in this process are the SAPS, probation officers, prosecutors and magistrates. The functions of these role players will now be discussed.

2.6.1.1 The role of the SAPS

When dealing with children in conflict with law, the CJA sets out certain requirements and provisions to members of the SAPS, who will be the child's first point of contact with the Child Justice System (Department of Justice and Social Development 2010:14). When a police officer suspects that a child who is presumed to have committed an offence is below 10 years of age, he or she should, as discussed previously, inform a probation officer. In accordance with the CJA, no child below the age of 10 years may be arrested and detained. Section 9 (a) requires that a child under the age of 10 be handed over to his or her parents or a guardian. If no parent or appropriate guardian is available, or if it is not in the best interest of the child to be handed over to a parent, the child may be placed in a youth care centre.

If a child is between the ages of 14 and 18 years, a police officer must deal with the child in terms of the arrest, detention and release provisions as set out in section 21, 22 and 23 of the CJA. This means that an officer can issue a summons or written notice for a child to appear at a preliminary inquiry, or arrest the child (Gallinetti 2009:21; McGregor 2010:28). If the officer detains the child prior to the first appearance, he or she needs to follow the provisions of section 28 (1) (a-d) of the CJA. The provisions stipulate that a child is kept separately from adults, and that boys and girls are also separated. Children furthermore need to be detained in conditions which take into account their vulnerability, and which will furthermore reduce the risk of harm to the child, or caused by the child. Police officials also need to assure that parents, appropriate adults, guardians, a legal representative, social workers, probation officers, as well as religious counsellors have access to the child. Children furthermore need to be cared for in a manner consistent with their needs, and police officials should ensure that immediate and appropriate health care is available in case of injury,

illness or severe psychological trauma. Additionally, section 28(1) (a-d) stipulates that children need to be provided with food, water, blankets and bedding. The following section will concentrate on the role of the probation officer.

2.6.1.2 The role of the probation officer

In Section 13 of the CJA the legislature requires of a probation officer to make an estimation of the child's age in cases where the age of the child is uncertain. This estimation is recorded on a proforma form (Form 3) (Annexure D). The probation officer should in accordance with section 13(2) consider any relevant information available to them, such as a previous determination of age by a magistrate under the CJA or under the Criminal Procedure Act, or an estimation of age in terms of the Children's Act. According to section 13(2) of the CJA, information often utilised by probation officers to assist them in determining the age of a child, are school documents, statements by parents or the child, and baptism or other religious certificates. In cases where probation officers are still uncertain about the child's age, a magistrate may order an evaluation or estimation of a child's age by a medical practitioner as stipulated by the CJA in section (Form 4) as prescribed in section 14(1) (d) of the CJA. If more information becomes available at a later stage regarding the child's age, the probation officer can change his or her estimation, provided that it is before the child is sentenced, as stipulated by the section 13 (4) of the CJA.

2.6.1.3 The role of the presiding officer

In terms of section 14(1) of the CJA an inquiry magistrate or a judicial officer who presides at the preliminary inquiry can make an age determination. In determining a child's age, the presiding officer may consider the probation officer's report, any relevant documentation or statement of a person, subpoena a person to produce additional documentation if necessary, or call for a medical examination. Section 3(a) requires that once the presiding officer has determined the child's age, he or she must enter it on the record of proceedings.

Once the age of the child has been confirmed and the child is determined to be under the age of 14 years, the next step is to establish the criminal capacity of

the child. Children between the ages of 10 to 14 years at the time when the offence was committed, are also presumed not to have criminal capacity (*doli incapax*). In contrast with children under the age of 10, this assumption is rebuttable; implying that the child may be held accountable for the crime if the State can prove beyond reasonable doubt that the child had criminal capacity when the crime was committed. The process to establish criminal capacity will henceforth be discussed.

2.6.2 Establishing criminal capacity

Criminal capacity refers to a term where a child possesses the mental capacity to be held responsible for an offence, has the mental ability to distinguish between right and wrong (cognitive ability), and understands the consequences involved (conative function) (Gallinetti 2009:17). As discussed earlier, it is important to consider the child's development needs as well as his or her age at the time of the alleged offence, or any other factors that could have influenced the child to commit the alleged offence(s). Various factors can diminish a child's criminal capacity, as discussed below in 2.6.4.

Two factors, as previously discussed, play a key role to determine if a child possesses criminal capacity, namely the child's cognitive and conative ability at the time of the alleged offence. The cognitive function relates to a child's ability or capacity to think, perceive and reason – the capacity by which children learn, solve problems and make plans (Badenhorst 2006:39). The conative function refers to the capacity of self-control and the ability to exercise free will (Badenhorst 2006:39). For example, when a child has the necessary criminal capacity his conative function will enable him or her to control his or her behaviour in accordance with his or her insights, make decisions, set goals, pursue them, and resist impulses (Badenhorst 2006:39). As Badenhorst (2006:39) rightfully states, "the key word is self-control". If a child lacks any of the abovementioned functions, or if any one of them is absent, the child will lack criminal capacity.

Determining a child's capacity cannot merely be simplified to a single question that will determine the child's future. Theoretical models found in the work of:

Michael Gottfredson and Travis Hirschi; David Farrington; Ronald Akers, and Terence Thornberry, for example provide sufficient evidence to this fact. All of the aforementioned theories emphasise the role of parents as the socialising agents in the child's life, indicating how children are 'schooled' in certain behaviour influencing their conduct (Schmallegger 2009:326; Siegel & Welsh 2009:188; Whitehead & Lab 2013:90; Williams & McShane 1999:220). This, however, is only one factor that needs to be considered during criminal capacity assessment. A sound theoretical knowledge of various theories during the assessment process, as discussed in chapter 3, reminds of the complexity of criminal behaviour and of the importance of a holistic individualised approach.

The following area of interest to this study, is the role players involved in the criminal capacity assessment process. This will be discussed below.

2.6.3 Role players in the criminal capacity assessment process

Each role player in the child justice environment has a set of particular responsibilities for which they are accountable, as set out by the CJA (Department of Justice and Constitutional Development 2010a:14). Probation officers, presiding officers and mental health professionals such as psychologists and or psychiatrists, are central to the process. Each profession plays a pivotal role in the process and their role and responsibilities will be discussed as such.

2.6.3.1 Probation officers

Probation officers are qualified social workers appointed by DSD to deliver services to children in conflict with the law (Department of Justice and Constitutional Development 2010a:15). Once the age determination process has been completed, probation officers have to establish the criminal capacity of a child who is alleged to have committed an offence.

The objectives of the assessment process are to identify the various needs and risk factors of the child, and then to express a 'view' on the criminal capacity of the child between the ages of 10 and 14 years (Department of Justice and Constitutional Development 2010a:15). In addition, a probation officer needs to

determine whether further evaluation is required by a mental health professional to prove criminal capacity beyond reasonable doubt, as stipulated in section 40 (g) of the CJA.

According to section 4 of the CJA, the assessment process requires that a probation officer evaluate the circumstances that surrounded the offence and the impact the offence had on the victim. Section 35 of the CJA furthermore stipulates that it is important for the probation officer to establish a possible reason(s) for the child's involvement in the alleged offence(s), and to express a view on the possible influence that adults or peers played in the child's behaviour and committing of the alleged offence. Additionally the CJA requires in aforementioned sections that probation officers consider if the child can be reintegrated into society, and if the child is willing to acknowledge responsibility for the alleged offence.

In general, social workers are concerned with the interactions between people and their socio-political, economic and cultural environments, which in turn can affect the ability of people to accomplish their life tasks, to alleviate distress, and to realise their aspirations (Earle 2008:15). Within the context of the CJA it can therefore be assumed that probation officers will evaluate the impact the environment had on the child's development and cognitive ability during the assessment process by evaluating all factors that gave rise to the criminal event. Evaluating a child's psycho-social environment and determining if a child might display characteristics of any personality disorders or mental illnesses, are further factors that need to be considered. These are all factors which can affect the child's ability to possess criminal capacity.

However, although certain guidelines are provided by the legislature of the core requirement that needs to be included within the assessment report, the execution thereof depends on the experience and skills of the probation officer. It is, therefore, vital that probation officers have the requisite knowledge of various aspects that could contribute to a child's unlawful behaviour. As discussed in section 2.6.2, role players need to consider a variety of factors during assessment in order to adhere to the requirements set out in the CJA,

that emphasise an individualised approach during criminal capacity assessment, and which are in the best interest of the child.

Equally important is the role of psychologists and/or psychiatrists in the criminal capacity process, which will be discussed henceforth.

2.6.3.2 Psychologists and/or psychiatrists

As mentioned previously, the court may request that the criminal capacity of a child is established beyond reasonable doubt. This can be requested in cases where the State wishes to prosecute or divert a child between the age of 10 and 14 years.

With the enactment of the CJA, section 97(3) stipulated that the Minister of Justice and Constitutional Development identify professionals deemed competent to conduct the evaluation of criminal capacity for children in conflict with the law. Section 11(3) of the CJA stipulates that psychologists and psychiatrists who are registered under the Health Professions Act, 1974 (Act 56 of 1974), are the only professions that are currently designated to conduct criminal capacity assessments of children in conflict with the law.

The process to establish criminal capacity differs from that conducted by probation officers, as well as the purpose of the assessment process. As mentioned previously, probation officers are only expected to express a 'view' regarding the child's criminal capacity, whereas psychologists and or psychiatrists are required to prove their findings beyond reasonable doubt. The CJA furthermore requires in section 11 (3) of psychologists and/or psychiatrists to evaluate each component of a child's development separately. This will entail that they evaluate the cognitive, emotional, psychological, moral and social development of the child.

Limited literature is available on the methods and assessment instruments utilised by professionals for the criminal capacity assessment process. In an interview conducted with a psychiatrist on 18 January 2015, she indicated that there are no standardised tools available in South Africa to assess criminal capacity as a whole, and that they make use of psychometric tests to establish

cognitive development, and use internationally accepted frameworks for moral development. According to her, attention is given to the child's psychiatric and developmental history. The child's mental state is also examined, which includes an assessment of attachment, ego development and social functioning (Personal interview 18 January 2015). The intelligence quotient (IQ) test frequently used is the SSAIS-R, which is currently only standardised for English or Afrikaans-speaking persons. The reliability of the test is reduced in cases of children who have other mother tongue languages, for example when Xhosa-speaking children are assessed. According to her, they could not as yet attract the services of a Xhosa-speaking psychologist. On average an assessment will take between 4-5 hours, and the report writing another 3-4 hours (Personal interview 18 January 2015). These initial findings point out that the criminal capacity assessment tools utilised by psychologists and/or psychiatrists are not adequate and cannot be regarded to provide a protective mantle to children.

2.6.3.3 Prosecutors

When a prosecutor considers the possibility to prosecute a child between the ages of 10 and 14 years, the CJA requires that various factors are considered such as the child's age, maturity level, education level, cognitive ability, as well as his or her domestic and environmental circumstances (Skelton & Badenhorst 2011:24). In addition, it is important to consider the nature and seriousness of the alleged offence, the impact the alleged offence had on the victim, the interest of the community, as well as the probation officer's report indicating the prospects to establish criminal capacity (Skelton & Badenhorst 2011:24).

If the prosecutor is of the opinion that criminal capacity is not likely to be proven, he or she must withdraw the charge and refer the child back to a probation officer. A prosecutor may also only divert a child before a preliminary inquiry if criminal capacity is likely to be proven (Skelton & Badenhorst 2011:24).

The provisions set out in the CJA referring to "prospects to establish criminal capacity" and "of the opinion that criminal capacity is not likely to be proved" cannot be regarded to be in the best interest of children (Skelton & Badenhorst 2011:24). It is unclear why these practices can be considered adequate.

Provisions as aforementioned can lead to subjective interpretations of a child's criminal capacity not substantiated by any proof (Skelton & Badenhorst 2011:24). It can furthermore lead to children not being assessed by a psychologist and/or a psychiatrist in order to save time and money.

It is furthermore not clear why a probation officer's 'opinion' regarding a child's criminal capacity assessment can be regarded as sufficient. In contrast to aforementioned provisions, section 11(3) of the CJA clearly indicates that the criminal capacity of children in conflict with the law needs to be assessed by a psychologist and/or psychiatrist.

The next step in the process is for a child to appear at a preliminary inquiry. This is an important process where a variety of factors are considered and evaluated in order to determine the best possible interventions suitable for a child's individual needs.

2.6.4 The preliminary inquiry

The preliminary inquiry is a new process introduced by the CJA, and complies with the obligations as set out by the UNCRC in article 40(3) (Department of Justice and Constitutional Development 2010a:4; Gallinetti 2009:38). Its aim is to create a child-centred process that prevents children from slipping through the intended safeguards as envisioned in the CJA (Gallinetti 2009:38). The preliminary inquiry was introduced to safeguard children from the negative practices of the past, which resulted in children being detained while awaiting trial for several weeks, and even months (Department of Justice and Constitutional Development 2010a:4).

The preliminary inquiry is an informal pre-trial procedure that does not require a legal representative to act on behalf of the child, and it is in essence the first appearance of the child before a presiding officer (Department of Justice and Social Development 2010a:19; Skelton 2013:263; Skelton & Badenhorst 2011:5). During the preliminary inquiry the CJA makes provision that children should, as far as possible, be given the opportunity to participate in the proceedings, especially where decisions affecting the child are taken (Badenhorst 2011:24). A preliminary inquiry must be held in respect of every

child who is alleged to have committed an offence, except for children under the age of 10 who are in accordance with the CJA presumed not to have criminal capacity. It may furthermore be suspended if the matter has been diverted by a prosecutor in the case of schedule 1 offences, or if the matter has been withdrawn (Gallinetti 2009:39).

The procedures at a preliminary inquiry aim to ensure that an individualised approach is upheld in each case (Department of Justice and Constitutional Development 2010a:19), and that a set of compulsory decisions will be taken during the inquiry to ensure that there is general consensus between the various role players (Gallinetti 2009:35). The preliminary inquiry furthermore aims to ensure that as much information as possible is obtained in the short time provided, and that both the child and the parents are included in the decisions taken during the inquiry (Gallinetti 2009:38). Where children have been arrested, for example, a preliminary inquiry must be held within 48 hours of the child's arrest. If a child has been handed a written notice or served with a summons, time periods as stipulated in the written notice or summons will apply (Gallinetti 2009:40).

One of the first objectives of the preliminary inquiry is to consider the assessment report of the probation officer (Badenhorst 2011:23). The assessment report will contain an age estimation as well as a view expressed by the probation officer regarding the child offender's criminal capacity, if the child was between the age of 10 and 14 years at the time of the alleged offence. The assessment report will in addition afford the presiding officer, as well as other role players, with an individualised picture of the child offender and the circumstances that gave rise to the alleged offence (Skelton 2013: 263).

During the preliminary inquiry the magistrate may consider the view expressed by the probation officer regarding the criminal capacity of the child, and/or request an additional evaluation of the criminal capacity of the child (Skelton 2013:264). This will entail a referral to a psychologist and/or psychiatrist in terms of section 11(3) for an evaluation of the cognitive, moral, emotional, social and psychological development of the child (Skelton 2013:264). This is done if any doubt exists regarding the criminal capacity of a child between the age of 10

and 14 years (Gallinetti 2009:35; Skelton & Badenhorst 2011:20). A more detailed assessment is also considered when, for example, a child poses a danger to him or herself or others, or where the child might be referred to a sexual offenders' programme if the social welfare history of the child calls for one; and/or if the child has a history of committing offences or absconding (Gallinetti 2009:35; Skelton & Badenhorst 2011:20). Additional objectives of a preliminary inquiry are to decide on the placement of the child, if he or she has been arrested and detained, and to refer the child to a children's court if the child is in need of care and protection (Badenhorst 2011:23).

Another objective is to consider if the matter can be diverted. In terms of section 49 of the CJA there are two orders that can be made at the preliminary inquiry. The first order relates to diversion as set out in section 52(5) of the CJA. This will necessitate that the presiding officer establish whether the child has acknowledged responsibility for the alleged offence, and secondly, if he or she is satisfied that the child had the necessary criminal capacity at the time of the alleged offence before diversion can be considered. Children who are diverted will not be imprisoned, but rather be directed to care and rehabilitation centres or other facilities or programmes (Gallinetti 2009:35; Skelton & Badenhorst 2011:20) as discussed in 2.3. The second order can be made to refer a child to the Child Justice Court for plea and trial. The child will then be referred to Legal Aid for legal representation. A schematic flow chart below illustrates the process followed when a child enters the CJS.

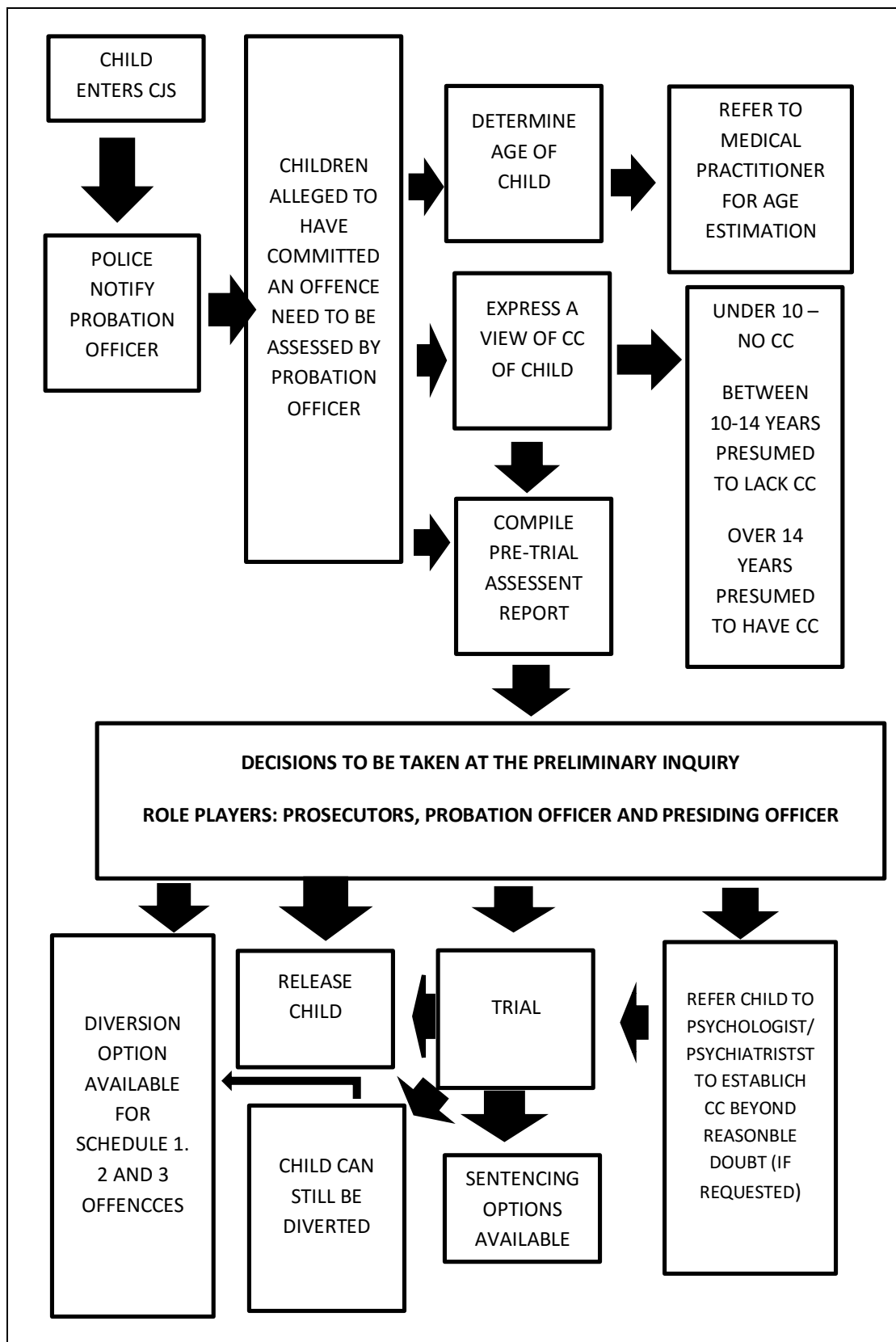


Figure 1: The process children follow in the Criminal Justice System
Source: Data obtained from the Child Justice Act (Act 75 of 2008).

2.6.5 Factors that could influence a child's ability to possess criminal capacity

Numerous studies point to the undesirable outcome for children exposed to adversities as they grow up (Sabates & Dex 2012:4). In this regard Pelser (2008:8) and Child Welfare Information Gateway (2013:5) concur and argue that children who commit serious and repeated offences are identifiable by their history of dysfunctional conditions and violations against their basic fundamental rights. This results in life-altering consequences for the child. Many children who end up in the Criminal Justice System are often exposed to harsh conditions in their families and communities, such as child maltreatment, psychiatric and behaviour disorders, community violence and family dysfunction (Pelser 2008:8). These factors can impair brain development, alter the brain's architecture and in turn affect the foundations which provide for future learning, behaviour and psychological health (Child Welfare Information Gateway 2013:4; Sabates & Dex 2012:4), ultimately resulting in diminished criminal capacity.

Children do not grow up in isolation, and human behaviour is shaped by the continuity and change in families, schools, peer groups and neighbourhoods (Sabates & Dex 2012:5). Some children are exposed to harmful factors even before birth; others are at risk during prenatal development which can be caused by an array of factors. Several studies can be located that investigated the influence of both maternal and infant biological risk factors on a child's cognitive abilities (Esposito 2014:3). Wasserman, Keenan, Tremblay, Coie, Herrenkohl, Loeber, and Petechuk (2003:3) focus on important risks that stem from individual factors, for example birth complications, sensation seeking behaviour, temperamental difficulties and hyperactivity, as well as family factors such as parental antisocial and/or criminal behaviour, poor child-rearing practice and substance abuse, to name a few. These are all factors that can contribute to impulsive behaviour in children, not taking long-term consequences of their actions into account.

As children grow older, new risk factors emerge in the form of peers, the school and the community, and these play a larger role in a child's life (Wasserman et

al 2003:3). Although many children with multiple risk factors never commit illegal acts, risk factors do increase the probability of offending (Shader 2000:3). These risk factors can all have an influence on the various areas of a child's development, affecting his or her ability to understand the implications of decisions.

Identifying factors that could have contributed to diminished criminal capacity in children is crucial during the assessment process. It is furthermore important to establish how these factors can be addressed in order to prevent further offending by providing child offenders with the best possible interventions. The CJA does not only aim to establish the child's criminal capacity during the assessment process, but it also aims to break the cycle of crime, accentuate the imposition of non-custodial sentences, rehabilitation, diversion and the re-integration of children into society in order to reduce the incidence of recidivism (Badenhorst 2011:9). These objectives can only be achieved if all the risks and needs are identified in the child in conflict with the law.

As aforementioned, negative, individual, familial, peer, school and community factors have all been identified by researchers to play an important role in various aspects of a child's development, which in turn will affect the way children will perceive, understand and experience their world, as well as react to these experiences (Child Welfare Information Gateway 2013:5). An overview will now be provided on the biological as well as environmental risk factors, and the consequences thereof on the child's development. A detailed discussion will follow in chapter 3 on the individual, familial as well as societal factors such as the school, peers and the community that could play a role in compromising the child's development and ultimately affecting his criminal capacity.

2.6.5.1 Biological risk factors

Although focus is placed on the biological risk factor domain in this discussion, it is important to mention that a holistic approach must be maintained throughout the assessment process and that the interaction of several factors on the child's cognitive, emotional and psychosocial development all need to be taken into consideration.

The foundations of brain development are laid down early in life through dynamic interactions of genetic, biological, psychosocial and environmental influences (Walker, Wachs, Grantham-McGregor, Black, Nelson, Huffman, Baker-Henningham, Chang, Hamadani, Lozoff, Gardner, Powell, Rahman and Richter 2011:1). Brain development starts prenatally, and even before children are born, a number of potential complications have been identified that could influence a child in all areas of his or her development (Reilly 2012:12).

For example, many South African mothers are compromising their children's brain development by smoking, drinking alcohol and using drugs during pregnancy. Research in the Western Cape (Mitchell's Plain) has exposed some of the alarming high rates of the use of Methamphetamine ('tik') during pregnancy and the devastating consequences thereof on the unborn child's cognitive development (Häefele 2011:65). Häefele (2011:65), a criminologist, has identified a variety of personality and cognitive disabilities in children who had been prenatally exposed to 'tik'. Hyperactivity, delayed physical, academic and social development, as well as temper tantrums were all factors identified in children exposed to 'tik' prenatally (Häefele 2011:63). Children also displayed inappropriate social behaviour (bullying, and preoccupation with genitals), low self-esteem, poor reasoning skills, a lack of motivation and criminal tendencies, and they could not put words or sentences together or recognise sounds (Häefele 2011:63).

According to Dr Johan Smith, a neonatal specialist at Tygerberg Hospital in the Western Cape, specific parts of the brain are affected in children exposed to prenatal 'tik' use. A decrease in attention span, verbal memory, long-term memory and cognitive functioning were factors identified (Rohwer 2013). In addition, 'tik' may also cause a significant drop in the IQ of the child, and it is believed that the effects on the child are irreversible (Rohwer 2013). Research provides evidence that the effect of 'tik' on the child's developing brain can cause severe brain impairment, resulting in poor impulse control, reasoning skills, and a lack of judgment when confronted with certain situations (Rohwer 2013). This is of particular importance in criminal capacity assessments.

Another factor that needs to be emphasised, is the effects of alcohol on the child's developing brain, which has been researched extensively (Mkosi, London, Adnams, Morojele, McLoughlin & Goldstone 2008:5). Fetal alcohol syndrome (FAS) is the most common form of mental retardation in the world, and the damage caused by alcohol use during pregnancy is similar to that found in children when prenatally exposed to 'tik' (Mkosi et al 2008:10). Intellectual and behaviour impairments, mild to moderate brain retardation, a delay in developmental milestones such as sitting and walking, poor eye-hand co-ordination, delayed development of fine and gross motor co-ordination, irritability and hyperactivity were all factors found in children prenatally exposed to alcohol (Mkosi et al 2008:10). Children furthermore displayed speech delays and language deficits, impaired interpersonal skills, as well as poor judgment and the inability to comprehend the possible consequences of an action. The intellectual functioning of children with FAS was found to be in the mild to moderate range of impairment, with an IQ of less than 69 (Mkosi et al 2008:10).

Equally important factors to consider during assessment are the relation between impulsivity, Attention Deficit Hyperactivity Disorder (ADHD), aggression and violence, which is well documented in the literature (Harpin & Young [SA]:138; Ward 2007:15). ADHD is a neurodevelopmental disorder of self-control or self-regulation, and is characterised by developmentally inappropriate and impairing levels of distraction and hyperactivity-impulsivity (Eme 2012:183). Children with ADHD are more at risk to commit offences due to their impulsivity, and they are also less likely to appreciate the seriousness of their actions (Harpin & Young [sa]:139). Although the extent of ADHD amongst South African children is not well documented, Ward (2007:16) argues that it is likely to be high.

In addition to the abovementioned predispositions that could affect a child's ability to have insight into his or her behaviour, research provides sufficient evidence that teenagers and young adults are not fully mature in their judgment, problem-solving and decision-making capacities (Nixon 2012). Neurological studies have discovered that the brain matures from back to front (Binford 2012:4). The back of the brain is responsible for, and controls basic functions

such as physical movement, sight and fundamental processing; the front of the brain is responsible for advanced thinking, and develops last (Binford 2012:4).

Situated in the frontal lobe is the prefrontal cortex, which is also known as the Chief Executive Officer (CEO) of the brain (Binford 2012:4). The highest level of thinking occurs in the prefrontal cortex, which is responsible for prioritising thoughts, imaging, thinking abstractly, anticipating consequences, planning and controlling impulses (Binford 2012:4). It furthermore manages 'response inhibition, emotional regulation, planning and organisation (Binford 2012:4). Voluntary behaviour control and inhibition, risk assessment, reward and punishment assessment, impulse control, decision-making, the ability to judge and evaluate future consequences, recognise deception and moral judgment, are also regulated by the prefrontal cortex (Binford 2012:4). According to Binford (2012:4), the prefrontal cortex furthermore does not finish developing until early adulthood (early 20s, concluding around the age of 25), this is quite significant to consider, especially in light of the current age of criminal responsibility in South Africa. Durrant (2013:49) argues that adolescence is a period where the rewards of risk behaviour become more attractive; however, the capacity to control and regulate behaviour is still developing. This undoubtedly will affect a child's criminal capacity.

2.6.5.2 Environmental risk factors

Infants and young children are vulnerable to abuse and neglect, and there is increasing evidence that children's early brain development and socio-emotional and cognitive development can be severely compromised by harmful parenting (Cashmore 2012:31). According to Cashmore (2012:31), it is clear that children who have progressed into the Child Justice System are more likely to have experienced abuse and neglect, have mental health problems and are developmentally delayed. In South Africa, where crime is rife and violence against children not an uncommon phenomenon, children are at an increased risk to be affected by violence. Evidence of this is provided in statistics revealed by the SAPS. In 2011/2012 a total of 50 688 children were victims of violent crimes in South Africa. Of these, 12 645 children were victims of common

assault, and 10 630 children were victims of assault with grievous bodily harm (Department of Women, Children and People with Disabilities 2013:4).

These figures provide sufficient evidence of the harsh circumstances some children endure daily. Child Welfare Information Gateway (2015:5) argues that recurrent types of abuse that can occur (even daily) in the lives of children, such as sexual, physical (corporal punishment), emotional abuse and neglect, can become stressful for the child. Although moderate predictable stress is not as harmful as severe or unpredictable stress, both cause problems during the child's development years (Child Welfare Information Gateway 2015:5). Researchers argue that a child's development is literally altered by toxic stress experienced during abuse, which manifests in his or her physical, cognitive and emotional growth (Child Welfare Information Gateway 2015:5). The research of Putnam (2006:3) points out that two fundamental developmental processes can be negatively affected by abuse and neglect, namely neurodevelopment and psychosocial development.

Neurodevelopment includes physical and biological growth of the brain, nervous and endocrine system, whereas psychosocial development refers to the personality formation of the child, which affects the child's moral values, social conduct, relationship with others and respect for social institutions, that in turn can lead to offending behaviour in children (Putnam 2006:3). The findings of a study conducted on the effects of child abuse and neglect indicated the significant chance for the victim, in this case the child, of becoming an offender himself (Durrant 2013:62). It can thus be concluded that children subjected to various forms of abuse and neglect, are very likely to develop impaired cognitive, social, moral and psychological development, which can weaken their abilities to evaluate, judge and foresee the consequences of their actions, and which will ultimately affect their criminal capacity.

2.7 THE PROPOSED ROLE AND FUNCTION OF THE CRIMINOLOGIST IN THE CRIMINAL CAPACITY ASSESSMENT PROCESS

As pointed out in chapter 1, the aim of this study is to explore if criminologists can be included within a multi-disciplinary team, consisting of role players such

as probation officers, social workers, psychiatrists and psychologists to assist the Child Justice System with criminal capacity assessment. The proposed role and function of criminologists in the criminal capacity assessment process will thus be explored.

As previously discussed in chapter 1, although improvement has been evident in recent years, criticism is still experienced from various professionals within the social and human sciences professions, and the role, practical applications and contributions that criminologists can make are still doubted by aforementioned professionals (Hesselink 2013:138). Steyn and Foster (2003:75) argue, the need for Criminology as a discipline to be involved in the Criminal Justice System, was already expressed in 1982. According to Steyn and Foster (2003:81), most South African criminologists agree that the study field of criminology entails the crime phenomenon in its totality. In other words, Criminologists aims to “understand the criminal and focuses on the biophysical and psychological aspects of the offender as a human being”, as well as the social environment in which the offender functions (Steyn & Foster 2003:81).

Criminology is an inter-disciplinary behaviour science also includes various disciplines such as psychology, anthropology, political sciences and social work within its study field. It utilises a holistic, individualistic approach with regard to offender assessment (Van der Hoven 2006:156). Van der Hoven (2006:156) emphasises that the aforementioned holistic, individualistic approach fully qualifies practitioners thereof to evaluate offenders. During assessment, criminologists focus on and take a variety of factors into consideration, such as causal factors that contributed to the criminal event, predisposition (personality make-up, genetic factors), precipitating factors, triggering factors (humiliation, isolation, anxiety, conflict at home) (Van der Hoven 2006:156). The factors mentioned in section 2.6, amongst others, culture, family background, motives, trigger factors, alcohol use and gang involvement serve as examples of factors that criminologists will take into account during assessment.

Additionally, criminologists also have a unique ability to individualise offenders to the role players; in this case child offenders to the Criminal Justice System. This will afford the role players in the Criminal Justice System with a better

understanding and insight into the behaviour and the motivation of the offender's behaviour (Hesselink 2012:135). Human behaviour, and specifically criminal behaviour, is immensely intricate, multi-faceted and complex (Hesselink 2012:135), which clearly warrants the inclusion of criminologists within the Child Justice System.

The emotional, social, psychological and cognitive wellbeing of individuals, in this case children, does indeed form part of the study field of criminology. This is evident in the variety of theories utilised by criminologists in an attempt to explain crime, for example the work of Farrington, as well as Gottfredson and Hirschi. These theories provide a foundation from which criminologists can explain criminal behaviour, the origins of the behaviour, as well as the impact it can have on the various areas of the child's cognitive, social and emotional functioning.

For example, as previously discussed, Badenhorst (2006:39) argues that a lack of self-control is a crucial aspect during criminal capacity assessment, which affects a child's ability to control his or her actions. The lack of self-control in child offenders who engage in criminal offences is an area familiar to criminologists and can be found in the work of Gottfredson and Hirschi. Gottfredson and Hirschi's Self-Control Theory asserts that the primary source of self-control is good parenting, and if children lack self-control, it can most often be ascribed to the child-rearing practices of their parents (Whitehead & Lab 2013:90). This will be discussed in more detail in chapter 3.

As previously indicated, many factors can cause a child to become an offender. Many children's childhood years are characterised by rejection, abandonment, conflict and abuse, which are often found in chaotic, dysfunctional families. Inconsistent parenting, family turmoil that flows from stress such as economic hardship and poverty, are all factors that will work against a child's normal development and ultimately influence the child's criminal capacity. All the aforementioned factors are important and will be considered by criminologists during assessment. It is clear that criminologists have an important role to play within the Criminal Justice System, as Steyn and Foster (2003:87) argue, both theoretical and applied aspects of criminology are relevant and complement

each other throughout the process of dealing with children in conflict with the law.

2.8 CONCLUSION

Remarkable improvements have been made in South Africa towards the protection of the rights of children in conflict with the law. However, with the implementation of the CJA, the Criminal Justice System was facing new challenges with the increase in requests to establish the criminal capacity of children. In order to accomplish the aim and set goals in the CJA, which is to serve the best interest of the child in conflict with the law, it is important to reconsider some of the current practices, especially in the establishment of criminal capacity of children. The purpose of this chapter was to provide a background and overview of the role players involved in the CJA and their current responsibilities. In addition, the researcher aimed to highlight the challenges associated with current practices and the need to address the current voids identified.

CHAPTER 3

CRIMINOLOGICAL ASSESSMENT PRACTICES IN CONTEXT

The kind of person who 'commits a crime like that' is one who has fallen through every crack in our society. He displays no empathy because he has never been shown empathy, he has no compassion because he has never been shown any, and he has no thought for the consequences of his actions, he represents the failure of our society to love and nurture our children (Holtmann (2011:iv).

3.1 INTRODUCTION

When children first enter the Criminal Justice System, it is often because, as Holtmann (2011:35) asserts, their lives are characterised by neglect, abuse and exposure to violence. Being constantly exposed to crime and violence in their homes and their immediate social environments, a significant proportion of South African children have learned and internalised this behaviour and thus replicate it (Pelser 2008:7). Excluded from society by the debilitating effects of poverty, poor education, a lack of appropriate skills and dysfunctional home environments, many children have 'normalised' crime and violence (Pelser 2008:8). As Pelsers (2008:9) rightfully argues, "for too many children, crime and violence is an intrinsic feature of socialisation, and an inherent feature of personal development", which can be observed in all spheres of their development.

The CJA accentuates that children in conflict with the law need to be afforded with the best possible interventions once they enter the Criminal Justice System, and an individualised approach is emphasised. The researcher believes that in order to achieve this goal, it is essential that assessment tools being utilised are appropriate and applicable for a multi-cultural society.

Though the assessment practices conducted by criminologists differ in approach, criminologists nonetheless follow a holistic, interdisciplinary

approach to arrive at conclusions (Hesselink 2012:136), which should form part of the assessment practices of other professionals.

Not all people (in this case children) who come into conflict with the law suffer from, or can be diagnosed with a personality disorder or mental illness that may partially explain his or her criminal conduct. In addition, psychological factors involved in crime causation do not necessarily imply mental illness (Van der Hoven 2006:163). Moreover, no single theory currently exists that can be fully utilised to explain crime typologies, or the origins and motives of criminal behaviour, or offer an explanation for the consequences these risk factors had on the criminal capacity of the child. This makes it imperative that criminal capacity assessment is conducted from a multi-disciplinary approach.

As pointed out by Maree et al (2003:77), criminologists do indeed recognise the parameters of their field of knowledge, and do not want to take over the work of psychologists or social workers. Criminologists furthermore do acknowledge that psychologists and social workers (probation officers) are highly skilled professionals who have earned respect in their selected fields of expertise, and are consulted and employed as such; but so should criminologists. In this regard it is important to mention that Bezuidenhout and Minnaar (2009:23) point out that criminology remains the science with an exclusive focus on and training in crime in its totality. Criminologists are multi-dimensional behavioural specialists who are schooled professionals analysing and assessing crime and criminals in a scientific way, utilising a rich field of theoretical explanations to illuminate various types of deviant and criminal behaviour (Hesselink 2013:246). This will be illustrated in due course.

In order to highlight the potential and contributions that criminologists can make within the Criminal Justice System, it is important to provide an overview of some of the theories utilised and applied by criminologists to examine, assess and explain criminal behaviour during assessment. These are all factors that are taken into consideration when dealing with any type of offender, and which can also successfully apply to child offenders in conflict with the law.

3.2 THEORETICAL APPROACHES

Hesselink-Louw (2004:214) points out the importance of a theoretical approach as an assessment tool utilised by criminologists. Theories are used to select and interpret, and are then applied to explain various types of criminal behaviour (Hesselink-Louw 2004:214). The practical application of the theories can be seen during assessment.

Over the past 100 years, as the field of criminology progressed and research improved, the number of theories for deviant behaviour has grown considerably (Whitehead & Lab 2013:48). The reasons why certain individuals act in certain ways at certain times have been raised by criminologists throughout the history of juvenile justice (Whitehead & Lab 2013:48). This is quite relevant in a case where the criminal capacity of a child is being assessed. Not only will criminologists assess the causation of the criminal behaviour, but they will also be able to explain the effect of risk factors on the individual's behaviour and conduct, predict future dangers and propose individualised rehabilitation strategies for children in conflict with the law.

There is no doubt that when one is confronted with the question of what causes crime, the answer is not simplistic. Barlow and Kauzlarich (2010:131) point out that when criminologists are confronted with the question of what causes crime, they will respond by asking: What type of crime? Crime rates? What type of criminal activity? Child or adult crime? (Barlow & Kauzlarich 2010:131). This is relevant in criminal capacity assessment, since it accentuates the all-encompassing individualised approach that criminologists would follow during an assessment.

An overview will now be provided of:

- Gottfredson and Hirschi's Self-Control Theory.
- Akers's Social Learning Theory.
- Farrington's Delinquency Developmental Theory.
- Thornberry's Interactional Theory.

The theory of Gottfredson and Hirschi, and that of Akers, are regarded as general theories, while the research of Farrington and also that of Thornberry, are classified as integrated theories. These theories were selected to provide an illustration of how criminological theories can be employed to assess the criminal capacity of children and provide an explanation for their engagement in criminal activities. This discussion will furthermore illustrate the practical contributions that criminologists can make in the criminal capacity assessment process, as well as the numerous factors that are taken into consideration by criminologists during assessment.

3.2.1 General theories

General theories attempt to explain a broad range of criminal conduct through a single overarching approach (Schmallegger 2009:18). Barlow and Kauzlarich (2010:131) point out that general theories are not restricted to any one time or place; however it does not mean that any particular theory has to explain all types of crime. Crime varies in many ways, for example from one population, time and place to another, and from one individual to another (Barlow & Kauzlarich 2010:131). This will become evident in section 3.3 when attention is paid to the assessment process of children in conflict with the law.

3.2.1.1 Gottfredson and Hirschi's Self-Control Theory

Gottfredson and Hirschi's general theory of crime is regarded as one of criminology's most important theories of antisocial activities (Piquero, Jennings & Farrington 2010:2). The theory is amongst the most widely cited and has been extensively tested since its publication in 1990 (Barlow & Kauzlarich 2010:136; Joubert 2003:110). The Self-Control Theory merges concepts of the Control Theory with rational choice, routine activities, as well as biological and psychological explanations (Barlow & Kauzlarich 2010:136; Joubert 2003:110). The inclusion of aforementioned factors provides evidence that criminologists are aware of a variety of intra-personal and environmental influences to be considered during assessment.

Rather than assume that behaviour is controlled by outside sources throughout an individual's life, Gottfredson and Hirschi argue that self-control is internalised

early in life and can serve to keep a person from becoming involved in deviant behaviour. They (Gottfredson and Hirschi) postulate that the primary source of self-control is good parenting (Whitehead & Lab 2013:90). In other words, poor self-control in children can be ascribed to ineffective child-rearing practices by parents (Barlow & Kauzlarich 2010:138; Whitehead & Lab 2013:90). Gottfredson and Hirschi (in De Lisi 2001:1; Whitehead & Lab 2013:90) argue that good parenting requires exhibiting concern for the child. This will entail consistent monitoring of the child's behaviour, the ability to identify problematic behaviour, display appropriate reactions to inappropriate behaviour, and the time and energy to carry through with parental responsibilities (Whitehead & Lab 2013:90).

Gottfredson and Hirschi claim that once self-control has been internalised, it serves to modify an individual's behaviour throughout his or her life. However, they do acknowledge that a positive influence by teachers may have an effect on low self-control (Barlow & Kauzlarich 2010:138; Whitehead & Lab 2013:90).

The traits associated with low self-control are: short time perspective; low diligence; low persistence; and tenacity or tendency to be adventurous, active and psychical (Whitehead & Lab 2013:90). Barlow and Kauzlarich (2010:138) as well as Schmallegger (2009:236) add that individuals with low self-control have the tendency to be self-centred, indifferent, or insensitive to the suffering and needs of others. The traits associated with low self-control as asserted by Gottfredson and Hirschi can, in conjunction with other risk factors related with learned behaviour, influence a child's ability to have the necessary insight into the long-term effects of their actions. All factors are relevant during criminal capacity assessment.

3.2.1.2 Akers's Social Learning Theory

Akers viewed the social environment as the most important source of reinforcement (Williams & McShane 1999:220). The Social Learning Theory is a general theory of crime and criminality and has been used in research to explain a diverse array of criminal behaviours. The theory, as proposed by Akers, is centred on the idea that "the same learning process in a context of

social structure, interaction, and situation produces both conforming and deviant behaviour” (Williams & McShane 1999:220). Akers’s theory posits that the principal behavioural effects come from interaction with, or under the influence of those groups which control individuals (Carey 2007:4). The main concept of Akers’s theory is that people commit crimes because they have learned an excess of attitudes and behaviours that favour breaking the law (Williams & McShane 1999:220). This is also one of the concepts of Sutherland’s Differential Association Theory (Williams & McShane 1999:220).

The Social Learning Theory points out the tendency of imitation or modelling, which is doing something because someone else is doing it (Carey 2007:4). The research of Pelser (2008:7) confirms the arguments of Akers, and posits that in a significant proportion of young South Africans, crime and violence has become ‘culturally acceptable’, mainly through consistent experience and exposure in the key institutions of their socialisation. This theory can be successfully utilised especially pertaining to children in dysfunctional families and communities, where children are ‘schooled’ in criminal behaviour and their actions reflect their ‘criminal education’, a lack of moral values and empathy which will influence their criminal capacity.

3.2.2 Integrated theories

One of the major developments in criminology in recent decades involves attempts to integrate two or more theories to provide a better explanation or understanding of criminality (Joubert 2003:104; Schmallegger 2009:18). These theories are referred to as multi-factor or integrated theories, and suggest that social, personal and economic factors all influence criminal behaviour (Joubert 2003:104). The criminologist will, for example, consider factors such as teenage pregnancies, hyperactivity, restlessness, low intelligence, poor academic record, school influences (labelling, rejected by peers), deviant peer groups, siblings, poverty, large family size, parents with criminal records and violence in the community, to name a few. The theory of Farrington, as well as that of Thornberry, will serve as examples of integrated theories and will demonstrate the correlation between risk factors that children are exposed to during their childhood, and the influence of these factors on a child’s criminal capacity.

These theories were selected due to their comprehensive inclusion of psychological, social, environmental and moral factors that are all relevant during a child's development, and which will ultimately influence a child's conduct and decision-making capabilities.

3.2.1.1 Farrington's Delinquency Developmental Theory

Farrington's theory explains how social factors can influence self-perceptions (Joubert 2003:106). It is known as a psychosocial theory or a social psychological theory. Since 1982, Farrington followed the offending careers of 411 London boys born in 1953, in an attempt to isolate the factors that predict life-long continuity of delinquent behaviour (Siegel & Welsh 2009:188).

Farrington found that the traits present in persistent offenders can be observed as early as eight years of age (Siegel & Welsh 2009:188). He argued that the chronic offender begins as a property offender, is born into a large low-income family headed by parents who have criminal records, and has delinquent older siblings (Siegel & Welsh 2009:188). Poor parental supervision, harsh erratic discipline and child-rearing practices are also a constant occurrence in the child's life. Farrington furthermore postulates that at the age of eight the child displays anti-social behaviour, aggression, impulsivity, hyperactivity, dishonesty and tends to have low educational achievements (Schmallegger 2009:326; Siegel & Welsh 2009:188). The typical offender not only commits property offences such as theft or burglary, they also engage in drinking, reckless driving, smoking, drug abuse and sexual promiscuity (Siegel & Welsh 2009:188). The following list summarises the specific risk factors that Farrington associates with forming a delinquent career:

- Prenatal and perinatal factors. Teenage mothers increase the risk of such undesirable outcomes for children.
- Personality. Impulsiveness, hyperactivity, restlessness, limited ability to concentrate and foresee the consequences of one's actions. These are important factors that will affect a child's criminal capacity.
- Intelligence and attainment. Low intelligence and poor performance in school are difficult to separate from each other. Farrington offers a

plausible explanation for the link between low intelligence and delinquency, and states that children with low intelligence might have a poor ability to appreciate abstract concepts and appreciate the feelings of victims.

- Parental supervision and discipline. Cold, rejecting parental discipline, or harsh, erratic discipline has been linked to delinquency and is associated with children's lack of internal inhibitions against offending. Physical abuse by parents has furthermore been identified as an increased risk of the children themselves becoming violent later on in life.
- Parental conflict and separation. A 'broken home' as such is not necessarily a risk for delinquency, but it is rather the conflict between parents leading to the separation that may affect children.
- Socio-economic status. Social deprivation and economic deprivation are important predictors of antisocial behaviour and crime.
- Delinquent friends. Delinquents tend to have delinquent friends. It is, however, not certain whether membership of a delinquent peer group leads to offending, or whether delinquents simply gravitate towards each other, or both.
- School influences. It is still not certain if it is a case of insufficient attention to bullying behaviour, or too much punishment, or too little praise that will affect the child.
- Community influences. Disorganised areas characterised by physical deterioration and overcrowded households do play a role in the young life of the offender (Siegel & Welsh 2009:188).

The theory of Farrington not only highlights the various risk factors associated with delinquent behaviour, but it furthermore provides ample evidence of the effects these risk factors may have on children. A lack of internal inhibitions against offending, impulsiveness, aggression, hyperactivity, restlessness, a limited ability to concentrate and foresee the consequences of one's actions, are all factors identified that may affect a child in the different spheres of his or her development. It is vital that professionals involved in assessing the criminal capacity of children regard these factors as important.

3.2.1.2 Thornberry's Interactional Theory

Thornberry has proposed what he calls an Interactional Theory of crime, which integrates social learning theory, social bonding, cognitive theory and social structure theories of delinquency (Hunter & Dantzker 2012:172; Schmallegger 2009:328). The major premise of Thornberry's theory is that the onset of crime can be traced to a deterioration of the social bond during adolescence, marked by weakened attachment to parents, commitment to school, and belief in convention values (Siegel & Welsh 2009:191). As youths enter adolescence, their bonds with their parents and social institutions are said to weaken (Hunter & Dantzker 2012:172). Thornberry points out that adolescents who are strongly attached to their parents and family and who strive to achieve within the context of approved social arrangements, such as education, rarely turn to serious delinquency (Schmallegger 2009:328). Weak bonds, however, steer kids to develop friendships with deviant peers and they consequently become involved in delinquency (Siegel & Welsh 2009:191). Frequent delinquency involvement then further weakens bonds with parents and makes it difficult to re-establish conventional ones.

During early adolescence, attachment to the family is critical; by mid-adolescence, the influence of the family is replaced by friends, school and the youth culture (Siegel & Welsh 2009:191). This is of importance and relevant in criminal capacity assessment, especially pertaining to the moral development of children who come in conflict with the law. Children who were already deprived of stable family relationships, and where immoral attitudes were taught or displayed by dysfunctional parents, may attain 'new' immoralities associated with their deviant peer groups. Thornberry believes that delinquency and social processes are interactional (Siegel & Welsh 2009:191).

Within the framework of the above theories on the development of criminal or delinquent behaviour in children, an overview will now be provided of the criminological assessment process. This will entail the evaluation of cumulative risk factors during a child's developmental years, and the effect thereof on the various areas of the child's development.

3.3 CRIMINOLOGICAL ASSESSMENT

Criminological assessment entails the collection of detailed information regarding the offender's crime, contributing factors of the crime, offending behaviour, emotional and physical health, social roles and other factors that played a pivotal role in the offender's problem situation (Hesselink-Louw 2004:238). This is done for example by utilising various theories as previously discussed, which will involve theoretical explanations of (but not limited to) researchers such as Gottfredson and Hirschi, Akers, Farrington, and Thornberry. These theories not only provide criminologists with the explanations of why certain individuals engage in unlawful behaviour, but furthermore offer an explanation on the effects of these risk factors on the offender's insight and reasoning abilities.

A child's reasoning abilities are especially important in the context of assessing children's criminal capacity. For example, it cannot be expected of children to have the necessary intellectual, moral or emotional insights into socially acceptable behaviour when they are 'schooled' in behaviour that is unlawful, but presented by their caregivers or peers as acceptable or deserving. Young children simply don't have the required insight.

Offending behaviour displayed by children can be the result of a variety of factors such as genetic, social, psychological, moral and environmental factors (Wasserman et al 2003:2) as also illustrated in the abovementioned theories, which all need to be considered.

According to the UNICEF Innocenti Research Centre (Landsdown 2005), children, at any given age, are a highly differentiated group and a wide range of factors will impact their development. Esposito (2014:3) argues, rather than looking at any specific risk factor that may be more influential than others, many research studies have used the cumulative risk model to demonstrate that exposure to multiple risks increases the negative effects of these risks on a child's development.

The first study to apply the cumulative risk model to cognitive outcomes was done by Sameroff, Seifer and Baldwin in 1993 (in Esposito 2014), and instead

of looking at socio-economic status as a sole predictor of IQ scores, they examined the influence of multiple social and family risk factors on the child's developmental outcomes. The studies found that the more risk factors experienced by a child, the more the child's IQ scores decreased (Esposito 2014:11). The number of risks, regardless of the type of stressor, also increases the likelihood of a negative outcome (Esposito 2014:11). In other words the model asserts that negative developmental outcome is not the result of a function of any one risk factor, but the accumulation or number of risk factors a child is exposed to. This makes a holistic individualised assessment approach imperative, which emphasises the necessity of including criminologists in the assessment process.

Attention will now be paid to a number of risk factors, for example biological, psychological as well as environmental risk factors that can influence a child's conduct. It is, however, important to point out that these risk factors were only utilised to illustrate how criminologists consider factors during the assessment process, thus, several other factors that should form part of the process were not included nor discussed.

3.3.1 Biological and psychological factors

In Chapter 2, attention was paid to prenatal factors where children are exposed to alcohol and the use of substances during pregnancy, ADHD in children, as well as current research on adolescents' problem-solving and decision-making capacities. Equally important factors such as the temperament of the child, psychological disorders in children, aggression and a lack of self-control, which could result in diminished criminal capacity in children, will now form part of this discussion.

Temperament

Individual factors refer to those factors that are located in individuals which can provide an indication of why certain individuals are more likely than others to engage in antisocial or criminal behaviour (Durrant 2013:56). The temperament of a child has been frequently addressed in research and is therefore essential to be underlined. Temperament refers to individual differences in behaviour,

reactivity, and self-regulation that are biologically based (Mrug, Madan & Windle 2012:2). Temperament is also influenced by environmental factors, and many dimensions of temperament such as low flexibility, poor attention regulation and a high activity level have been associated with antisocial behaviour (Mrug et al 2012:2). Researchers contribute this to the fact that the temperament of the child can lead to poor self-control, as evident in Gottfredson and Hirschi's Self-Control Theory, which in turn may lead to a lower quality of parent-child relationships, more negative life events, lower academic, cognitive and social competencies, as well as associations with deviant peers (Mrug et al 2012:2). According to Durrant (2013:57), children who have what has been termed a 'difficult' temperament, are also more likely to be restless, irritable, emotionally labile, and harder to please, which in turn puts them at a greater risk to engage in unlawful behaviour.

Psychological disorders

These traits are also often present and displayed by children with psychological disorders, for example in children with conduct disorders. Bartol and Bartol (2008:57) point out that psychological disorders, such as conduct disorders, are also often associated with youth offending. Behavioural indicators of a conduct disorder (a cluster of behaviours characterised by persistent misbehaviour such as egocentrism, lack of empathy, cruelty and not compliant with rules), are sometimes present well before the child enters the school (Bartol & Bartol 2008:57).

According to Bartol and Bartol (2008:51) a high percentage of children and adolescents diagnosed and treated for antisocial behaviour and conduct disorders, also display language and cognitive impairments. In turn, children with language impairment will find it difficult to express their point of view, which can lead to an increase in frustration levels in these children, amounting in aggression and disrupted behaviour at home and in the school (Bartol & Bartol 2008:51). Identifying if a person (in this case a child) displays any characteristics of psychological disorders or mental illnesses, for example depression, violent outbursts, lack of empathy, hyperactivity and other symptoms associated with

certain types of disorders, is a core function of criminological assessment (Hesselink-Louw 2004:169).

Aggression and risk-taking behaviour

Although aggression and risk-taking behaviour are often associated with children in early childhood, for example snatching toys and pushing a playmate, Reebye (2005:16) points out that early antisocial behaviour is possibly one of the best predictors of later delinquency. Literature suggests that aggression starting at an early age continues throughout development, and is a predictor of later aggressive behaviours (Reebye 2005:17). Children can display aggression for a number of reasons, and infants with difficult temperaments, as discussed previously, are also more likely to be aggressive and have behaviour difficulties later on (Reebye 2005:18). In addition, reports of deviant parental models, as well as the combination of a depressed mother's emotional unavailability, her difficulties in teaching self-regulation to her children and focusing negative attention on undesirable behaviour, are all associated with aggression in children (Reebye 2005:18).

Reebye (2005:17) argues that it is important that several other factors are considered before identifying aggressive behaviour as a disorder, and asserts that poor impulse control often underlies aggression. In this regard, Gottfredson and Hirschi also attribute the lack of self-control with ineffective parenting (Whitehead & Lab 2013:90).

How children express their emotions (especially anger) early in life may contribute to, or reduce their risk for delinquency (Wasserman et al 2003:2). This is especially evident when early aggression occurs in children before the age of 13 (Siegel, Welsh & Senna 2006:146; Wasserman et al 2003:2). Providing an emotionally stable and stimulating environment for children will help ensure optimal cognitive development (Arredondo 2003:15). When a child is raised in a toxic, dysfunctional environment and deprived of positive experiences, learning disabilities and cognitive delays often present (Arredondo 2003:15). Attention will now be paid to factors in the environment that can contribute to a range of impairments in a child's development.

3.3.2 Environmental factors

Childhood is an intense period of rapid development when children accumulate information needed for identity formation and social integration (Arredondo 2003:14). During development children are particularly sensitive to environmental (peer, educational, familial) and social influences (see Akers's Social Learning Theory). Biological as well as neurological changes are also reflected in the child's cognitive, emotional, moral and abstract reasoning (Arredondo 2003:13). Children often do not have the necessary developmental opportunities of internalising consistently caring, reliable and fair adult authority figures. Various people form part of a child's life, for example parents, grandparents, peers and teachers, who in turn have an influence on a child's socialisation and emotional expression.

The family

The family is the primary unit in which children learn values and attitudes, and the actions of parents, for example poor parental role-models (compare Gottfredson and Hirschi), harsh or erratic disciplinary measures, weak attachment, a lack of supervision and domestic violence can guide the actions of children throughout their lives, dictating their emotional, social and moral values (Arredondo 2003:13; Durrant 2013:63; Muntingh & Gould 2010:10; Siegel & Welsh 2009:188).

Many children are being socialised in dysfunctional families, as evident in Akers's Social Learning theory, and several experts believe that family dysfunction is a key ingredient in the emotional deficits that eventually lead to long-term social problems (Siegel & Welsh 2009:188). According to Muntingh and Gould (2010:10) literature indicates that hostile family circumstances contribute significantly towards risk for violent and aggressive behaviour during adolescence and in later life. When children are exposed to family violence they are at an increased risk to act aggressively themselves (Muntingh & Gould 2010:10). Muntingh and Gould (2010:10) indicate that a study conducted in Colombia found that children exposed to both domestic violence and maltreatment were more likely than other children to display aggressive

behaviour, for example carrying weapons and responding with physical aggression – compare with Farrington's Delinquency Development Theory..

Additionally, parents who employ punitive approaches to discipline (including corporal punishment) and who tend to be cold and rejecting, and employ erratic and inconsistent discipline, are more likely to have delinquent children (Durrant 2013:63). Some disciplinary practices such as physical punishment have been found to weaken the bond between parents and children, it may lower a child's self-esteem and encourage children to become more secretive and dishonest (Siegel et al 2006:208).

Parents often punish their children with the best intentions, for example to teach them the behaviours that will be most helpful within the context of the society in which they are growing up (Fontes 2005:118). How parents choose to discipline their children also depends on factors such as culture and religion. Religious ideas about sin, purity and redemption can also undoubtedly influence parents' attitudes toward punishment (Fontes 2005:118).

Children who grow up in a family environment with hostile and rejecting parents may subsequently develop a distorted view of the world and of human relationships; they come to believe that people are inherently untrustworthy and manipulative, and additionally, they will have a limited ability to concentrate and foresee the consequences of their actions (Durrant 2013:63; Siegel & Welsch 2009:188).

The interactions between parents and children, and between siblings, also provide ample opportunities for children to acquire or inhibit antisocial behaviour (Siegel et al 2006:201). Harmonious relationships between parents, and between parents and children, help to prevent delinquency and crime (Conklin 2010:188). According to Woodhams (2008:21), research has supported the relationship between family factors such as parents' use of poor discipline styles, a lack of parental support, a lack of parent-child interaction, poor attachment, family conflict, and experiencing and witnessing aggression. Parents of anti-social children have been found to be inconsistent rule setters,

to be less likely to show interest in their children, and to display high levels of hostile detachment (Siegel et al 2006:206).

In cases where children have experienced some form of maltreatment they may attain mental representations characterised by a lessened sense of self and mistrust of others (Siegel et al 2006:217). Children who have experienced frequent sexual abuse over long periods (with penetration) are also more likely to experience long-term trauma, including post-traumatic stress disorder (PTSD), advanced sexuality (the knowledge thereof) and poor self-esteem (Siegel et al 2006:213). In addition, many sexually abused children engage in aggression and delinquent behaviour. There is, furthermore, a strong correlation between sexual abuse and prostitution (Siegel et al 2006:213). It has also been reported that children who are physically or sexually abused, especially young males, are much more likely to smoke, drink and take drugs than non-abused youth (Reid 2012:71).

Social learning theorists argue that children are more likely to adopt violent behaviour through a process of modelling and imitation if they are the victims of abuse or neglect (Durrant 2013:62). Children are, furthermore, more likely to form weak attachments to their parents, which may reduce self-control and contribute to the development of hostile views of close relationships (Durrant 2013:62).

Thornberry (in Siegel et al 2006:154) asserts that attachment to the family during adolescence is the single most important determinant of whether a child will adjust to conventional society and be protected from delinquency.

By mid-adolescence, the influence of the family is replaced by the view or influence of friends, school and the 'youth culture' (Siegel et al 2006:155). Weatherburn (2001:4) and also Siegel and Welsh (2009:191) argue that it appears that juveniles are most likely to form strong attachments to delinquent peers when parental controls or parental attachments are weak, which in turn will lead to more delinquent acts.

Education

Another factor to consider is the influence of pre-school education and a child's school experiences. The quality of child care provided by day-care varies. Poor quality child care has been reported to put children's development at risk for poorer language and cognitive development, and lower ratings of social and emotional adjustment (Bartol & Bartol 2008:44). Moreover, participation in quality preschool programmes directly impacts children's intellectual and social development, which is linked to higher cognitive functioning at school entry (Esposito 2014:4). Early cognitive achievement and preschool participation also have an enormous impact on psychosocial trajectories, such as high levels of employment and decreased offending behaviour (Esposito 2014:4). This is confirmed by the research of Conklin (2010:188) who asserts that children with low levels of academic performances are especially likely to be delinquent, commit serious and violent offenses, and persist in delinquency. Diminished cognitive abilities in turn influence a child's ability upon school entry, which affect late academic outcomes (Esposito 2014:7).

A lack of commitment to school and a lack of support for school rules are furthermore strong predictors of delinquent behaviour. Poor cognitive development, as discussed previously, and behaviour problems during early childhood, could explain the association between academic achievement and delinquency (Wasserman et al 2003:4; Woodhams 2008:24). In addition, children who are frequently in trouble with their teachers, or are disliked by their peers due to their antisocial behaviour, are often labelled. According to Siegel et al (2006:130), children exposed to negative sanctions experience both self-rejection as well as a lowered self-image. Self-rejection attitudes can then result in both a weakened commitment to conventional values and the motives to deviate from social norms (Siegel et al 2006:130). School failure can have serious consequences for a child's social and psychological development (Hesselink-Louw 2004:150).

Negative influences in the social environment, especially factors such as poverty, a lack of education, absence of marketable skills, subculture values and high crime rates in a community can predispose some people to lives of

crime (Pelser 2008; Schmalleger 2009:260). Social process theorists examine institutional arrangements within a society and the interaction between the institutions, individuals and groups to determine the impact thereof on the social behaviour of the individual and groups (Schmalleger 2009:260). Social learning theorists, for example, pay special attention to learned behaviour in the social environment and argue that criminal behaviour is a product of the social environment where people learn to commit crimes (Schmalleger 2009:260). In other words, social process and social learning theories will direct the attention of criminologists to the consequences of the social environment on children.

Communities

When young children are exposed to violence in their communities, they tend to show insecure attachments, an increased risk of behaviour problems as well as aggressive behaviour (Walker et al 2011:7). The individual learns at an early age that violence is a routine feature of everyday life, either within their family of origin or within their local community (Hesselink-Louw 2004:59). According to Hesselink-Louw (2004:58) research confirms that children who are exposed to violent and aggressive behaviour are four times more likely to suffer from psychological problems such as anxiety and aggression problems. They furthermore tend to show insecure attachments, and are at an increased risk of behaviour problems as well as aggressive behaviour (Walker et al 2011:7).

Shader (2000:6) furthermore argues that most researchers agree that living in a neighbourhood where there are high levels of poverty and crime increases the risk of involvement in serious crime for all children growing up there. As a result of poverty, children are exposed to more adversarial psychosocial and physical environmental risks such as chaos in the home, family stress, dangerous and deteriorated neighbourhoods, and crowded conditions (Esposito 2014:10). Exposure to these multiple risk factors early in life, can cause significant delays in cognitive performance, which in turn affect school readiness and achievement (Esposito 2014:10). According to Shader (2000:6) there is also evidence to suggest that children from families with four or more children have an increased chance of offending.

Poverty

According to Bartol and Bartol (2008:38), research strongly indicates that poverty in families is one of the most robust predictors of adolescent violence for both males and females. Children living under these conditions are also more likely to be victims as well as offenders (Bartol & Bartol 2008:38). Researchers such as Merton and Shaw and McKay (see Hollin 2005) have also highlighted the correlation between poverty and antisocial behaviour. Strain theorists argue that disadvantaged communities are faced with a choice to accept their situation, or attempt to gain success either by legitimate or illegal methods (Hollin 2005: 89).

Cultural influences

Liese (2003:164) points out that it is important to understand socio-moral development from a cultural perspective in order to understand children's decision-making processes. In some cultures children are schooled in practices such as witchcraft, genital mutilation, the occult, the natural and supernatural world as well as muti murders (Petrus 2010:61). Children are taught from a young age about the existence of their cultural beliefs and the importance thereof (Petrus 2010:61), which can influence children significantly, positively as well as negatively.

According to Van der Hoven (2001:16), in some black communities for example, when adolescents are initiated into manhood, they learn that they should consider themselves as the rulers and leaders, and that women are secondary to them and are often regarded as inferior beings. Van der Hoven (2001:16) argues that the domination of, and violence towards women is ingrained in the tradition of family relationships in South-Africa, and that certain traditions for example lobolo, the patriarchal system, and polygamy can contribute to domestic violence, particularly wife abuse.

Peers

The effect of the peer group in the child's later years is reported by many researchers as an important risk factor in the development of violent offending

(Woodhams 2008:21). Association with a delinquent peer group is thought to occur as a result of poor parenting, in other words through a lack of supervision, closeness and attachment. As in the case of the family, values and beliefs supportive of criminal behaviour are learnt and rewarded through interaction with delinquent peers (Woodhams 2008:22).

Vulnerability to gang involvement tends to be particularly strong when families are dysfunctional, as gangs provide a surrogate family and a sense of belonging (Department of Social Development 2012:25). In addition, a lack of access to leisure activities in the community or school is one reason offered as to why children were attracted to gangs. Gang leaders, who in some cases are linked to wider organised crime and drug-related networks, often sponsor youth activities and sport teams (Department of Social Development 2012:25). Peer rejected, antisocial children are drawn to deviant groups with members similar to themselves, and this in turn encourages and amplifies the already existing antisocial tendencies (Bartol & Bartol 2008:42). It is argued that a child's position within a gang (group hierarchy) can be increased by his or her commission of criminal acts, which additionally may become a motivating factor for more violent behaviour (Woodhams 2008:23).

The effect of biological and environmental factors on a child's development

Arredondo (2003:13) argues that chronological age is a poor index of neurobiological and emotional maturity, and that the typical youth who appears in the Criminal Justice System, comes from chaotic homes and neighbourhoods where they learn from a young age that the world can be unpredictable, unreliable, threatening, and unfair (Arredondo 2003:13). The research of Siegel et al (2006:201) confirms this, and argues that many children are being socialised in dysfunctional families. Several other experts believe that family dysfunction is a key ingredient in the emotional deficits that eventually lead to long-term social problems. As discussed, a variety of risk factors can have a significant effect on a child's social, moral, emotional, psychological and cognitive development.

The following areas were identified that may have an effect on a child's criminal capacity: low self-esteem; reduced self-control; self-rejection; hyperactivity; hostile detachment; a limited ability to concentrate and foresee the consequences of actions; insecure attachments; impulsiveness; anxiety; PTSD; a distorted view of the world and human relationships; psychological and emotional aggressiveness; diminished cognitive abilities; language impairment; low intelligence; a mistrust towards others; immorality that is imitated by learned behaviour; and emotional deficits. These factors are focused on during criminological assessment, because the process specifically deals with risks associated with the causation of criminal behaviour. Additionally, all these aspects are linked to the criminal capacity of children who are in conflict with the law.

3.4 CONCLUSION

The juvenile system in South Africa has a particular responsibility towards children who find themselves in conflict with the law. Children and their behaviour patterns are often the by-product of a variety of biological and environmental influences. Many children enter the world already compromised by a mother's substance abuse and/or alcohol abuse during pregnancy, or by the poverty that he or she is born into, within an already dysfunctional violent community. With the high rates of neglect and abuse in South Africa, it is also very likely that not many children experience warm relationships where they are able to learn values, morals and empathy for other people, enabling them to become productive, well-balanced members of society.

When children enter the CJS they are vulnerable, and in many instances the victim of the very people who were supposed to have protected them. Ensuring that children receive the adequate care and attention they deserve, preventing them from further offending and addressing their immediate risks and needs, requires dedication, skills, resources as well as a multi-disciplinary team consisting of various professionals, including criminologists who are able to assess multiple factors contributing and leading up to the criminal event.

This chapter highlighted some criminological theories, the implementation of which would add definite value to the assessment process of a child's criminal capacity. In view of the above literature survey, it is contended that criminologists are specifically trained in these theories and therefore would bring astute academic capabilities to a multi-disciplinary team in the process of assessing a child's criminal capacity. If the core value is to uphold the best interests of the child, all involved persons should acknowledge that the best possible team should serve these interests.

Chapter 4 will present the responses of participants who were interviewed to shed more light on the research objectives (as stated in section 1.5.2), namely to determine if the process currently used to establish criminal capacity of children in conflict with the law, is in the best interest of the child, and to examine the role criminologists can play in the criminal capacity assessment of children in conflict with the law.

CHAPTER 4

ANALYSIS AND THE INTERPRETATION OF THE RESEARCH FINDINGS

4.1 INTRODUCTION

This chapter will focus on presenting the findings from the study as outlined in the aim and objectives of this study. The aim of the study was to explore if criminologists can be included in multi-disciplinary criminal capacity assessment of children in conflict with the law, and to explore the role that criminologists can play in this process. The objectives were to determine if the process currently used to establish criminal capacity of children in conflict with the law is in the best interest of the child, and secondly if there is scope for the inclusion of criminologists in the criminal capacity assessment process.

Individual and focus group interviews were used to collect data from child justice practitioners involved in the criminal capacity assessment process, namely magistrates, prosecutors, psychologists, probation officers, social workers in an NGO, psychiatrists and advocates from Legal Aid.

Data were collected in two stages.

- Phase one comprised **individual interviews** with a prosecutor, a magistrate and two probation officers.
- Findings from these interviews were explored in more detail in phase two, during which **three focus groups** and **six individual interviews** were conducted.

The multi-levelled approach of data collection allowed for an in-depth exploration of the topic in question. Thematic analysis, as proposed by Rabiee (2004:657) and Morse and Field (in Poggenpoel 1998:340), was used for the analysis of the data.

4.2 PRESENTATION OF THE FINDINGS

As discussed in chapter 1, the researcher made use of a semi-structured interview schedule (Annexure B), which served to guide the interview rather than dictate it (Greeff 2011:353). This method allowed the researcher to probe and ask additional questions as the need arose, and to gain a complete in-depth view of the criminal capacity assessment process in question. This in turn provided the researcher with additional data. The additional data were important as it shed more light on the criminal capacity assessment process, and highlighted various voids and issues that could hamper and influence the best interest of the child.

Five questions were used to collect data in this study. The first two questions were employed to explore the participants' perceptions regarding section 11(3) of the CJA; the directive that only psychologists and/or psychiatrists are designated to assess the criminal capacity of children in conflict with the law. The questions were utilised to establish if current practices as stipulated by the CJA are adequate and in the best interest of child offenders. In addition to these questions, participants were asked if there is scope for additional role players in the criminal capacity assessment process, and if following a multi-disciplinary approach could be in the best interest of child offenders.

A further question was employed to establish participants' perceptions if criminologists could play a role in the criminal capacity assessment process. The professions of the participants are included in the discussion of the findings, since correlations and differences in opinion between the different role players are of relevance in this study.

The responses of the participants are presented in their direct words, without editing, as it was deemed more important to record the nuances contained in their responses, rather than risk manipulation of the meaning by making grammatical corrections. Where the response was in a different language, the researcher presents an own translation in square brackets.

4.2.1 AN EXPLORATION OF THE CRIMINAL CAPACITY PROCESS

As indicated, the interview commenced with an exploration of the current criminal capacity assessment approach where psychologists and/or psychiatrists are the only designated professionals assigned by the CJA to conduct these assessments. The aim was to establish if the participants deemed the process as adequate and in the best interest of the child.

4.2.1.1 The criminal capacity assessment process and the designated role players

As mentioned, in accordance with section 11(3) of the CJA, criminal capacity assessments may only be conducted by a psychologist and/or psychiatrists. Participants were asked if they think this is adequate and in the best interest of the child.

The majority of the participants (in this instance, probation officers) were of the opinion that psychologists are the only professionals trained to conduct criminal capacity assessments.

Ek dink dit is in die best interest of the child, hulle (sielkundiges) kyk uit 'n ander rigting as wat ek kyk [I think it is in the best interest of the child, they (psychologists) approach assessment from a different perspective.]

As ek (proefbeampste) my assessment verslag opstel gaan ek miskien dink die kind is baie bakkig, jy het criminal capacity, maar nou gaan daai sielkundige vrou van 'n ander kant af, dieper in, dan as die verslag terug kom, dan dink ek, wraggies waar, daai ietsie het ek gemis. [When I (probation officer) compile my assessment I might think that the child has criminal capacity due to his eloquence and language abilities, however when I receive the assessment report back from the psychologist I might think, I did indeed miss something.]

This opinion was supported by psychologists who participated in this study. They strongly supported the opinion of the probation officers that psychologists are best qualified to conduct criminal capacity assessments, since they viewed cognitive development assessment as being the domain of psychology, and that it should remain as such. The opinion is predominantly because psychologists assess aspects such as cognitive, moral, social and emotional development that are of relevance during the assessment of a child's criminal capacity.

Psychologists do IQ assessment and when it comes to psychopathology that belongs to us, fortunately or unfortunately.

Obviously, a GP (General Practitioner) can also assess depression, but most of us (psychologists) are trained to diagnose and treat.

When it comes to intellectual disability and psychopathology it belongs to our (psychologists') world.

In addition to this opinion, one psychologist was of the opinion that certain social workers or probation officers are equally equipped to assess or evaluate the moral, social and emotional development of the child.

During one of the individual interviews a psychiatrist emphasised the important role of mental health professionals as a crucial part of the criminal capacity process.

A full mental health evaluation is vital to determine the criminal capacity of children in conflict with the law.

Even though the psychiatrist concurred with the probation officers and psychologists about the important role of the psychologist in the assessment process, she highlighted that criminal capacity assessment is a specialised field.

Firstly, any psychologist undertaking such assessment must be a clinical psychologist, since the influence of

developmental and psychiatric disorders on criminal capacity is fundamental. Secondly, not every clinical psychologist has the requisite training and experience in child and adolescent psychiatry to be able to diagnose developmental or psychiatric disorders in children.

Although one magistrate acknowledged the important role of psychological reports, she emphasised the autonomy of the court in the criminal capacity assessment process, and argued:

I think the Court should be able to use whoever is appropriate for that specific child, if I want more information, I want to be able to call the child's doctor, or teacher for example. I do it anyway, if it is in the best interest of the child.

Participants from an NGO who are social workers, concurred that psychologists were important in the process, especially their cognitive evaluations, which form a benchmark to work from. In contrast to their view about psychologists they indicated that in their opinion they did not see the need for psychiatrists in the process.

In contrast to the aforementioned results, two prosecutors and one magistrate indicated that they thought the current criminal capacity assessment process was not adequate, nor in the best interest of the child.

No, it is not in the best interest of the child to restrict criminal capacity assessments only to psychologists and psychiatrists. I believe social workers (and not just probation officers appointed by the Department of Social Development) working with children and who have first-hand knowledge of the developmental stages of children, should be allowed to do criminal capacity assessment.

Currently, psychologists compile criminal capacity reports based on a three hour interaction with the young offender,

based on this information a report will be compiled. I don't think this is adequate.

Assessment reports compiled by probation officers lacked depth, I don't think they are capable of conducting criminal capacity assessments. It should rather be conducted by psychologists. Yes I think it is in the best interest of the child.

Although the findings indicate that the majority of the participants initially identified psychologists and/or psychiatrists as the two professions qualified to conduct criminal capacity assessments, it came to the fore that the shortage of psychologists, time constraints to conduct assessments, a lack of training of role players and the tools utilised during assessment, could hamper the assessment process and ultimately affect the best interest of the child. These factors are discussed in the following sections.

4.2.1.2 The scope for additional role players

One of the areas identified by the researcher as a possible void in the assessment process was a lack of a multi-disciplinary approach during the criminal capacity assessment process (Badenhorst 2006:124). The possibility of using a multi-disciplinary approach in the assessment of child offenders' criminal capacity was explored during the interview, and the participants were asked if there could be scope for more role players in the process, and who should be included in such a multi-disciplinary team.

Although the majority of participants in this study were in favour of a multi-disciplinary approach in the assessment of children's criminal capacity, some participants had reservations and struggled to identify other role players that are proficient to execute criminal capacity assessments, and some were unsure if there was scope for more role players. The following three responses were uttered by probation officers.

Is daar scope vir meer rolspelers in die proses? [Is there scope for additional role players in the process?]

Is daar ander professies wat assessment kan doen? [Are there other professions equipped to conduct assessment?]

The teacher, the social worker, the pastor (for moral), the child's parents, the psychologist.

Some of the participants who are probation officers concurred that if they receive the necessary training they will be able to conduct criminal capacity assessments.

Ek dink ons kan alles doen, ons is net skrikkerig vir die cognitive part; ons is mos nie regtig opgelei om so diep in te gaan nie. [I think we can do everything, we are just scared of the cognitive part; we are not really trained to do in-depth analysis.]

We have the people, there are probation officers with honours degrees, and some are busy with their masters at UCT (University of Cape Town).

When asked if a multi-disciplinary approach in criminal capacity assessment is in the best interest of the child, mixed reactions were noted. One of the prosecutors supported the idea of using a multi-disciplinary approach, but had the following reservations:

Yes, the more people that investigate the background of the young offender the better, but, only one person must conduct the interview with the young offender.

Social workers, field workers, child care workers, assistant probation officers, SAPS, or private investigating officers. These people can gather information about education, religious interactions and submit this information to the social worker who conducted the interview.

Psychologists highlighted their specialisation areas to substantiate why their role is important during the criminal capacity assessment process.

Other practitioners do not have the clinical training for a clinical interview and the depth of understanding about mental health of children.

The thing that we (psychologists) do that is different is that we integrate the social, emotional, moral, socio-economic, intellectual, and medical background.

When we (psychologist) do clinical psychology, that is why I specify clinical psychology, what we do is, we have all those years of the theory in the background, and then we are placed in a mental institute, in a psychiatric hospital, so we get to do a detailed, in-depth intake interview, and we are taught how to use that; there isn't that depth of training in any profession except for psychiatry.

Ninety nine per cent of my (psychologist) patients can tell me what borderline personality disorder is, but they don't understand it. That is where my concern comes in; it is not one plus one equals two.

Findings indicate that even though the participants initially struggled to identify role players that should be included in a multi-disciplinary assessment team, the majority concurred that a multi-professional approach in criminal capacity assessment is in the best interest of children in conflict with the law.

4.2.1.3 The role of the criminologist in a multi-professional assessment team

As previously indicated, participants in this study were unsure who should form part of a multi-disciplinary assessment team, and although the majority argued in favour of such an approach, there was hesitation on the part of some participants regarding the inclusion of criminologists. Initially, only three participants indicated that criminologists should form of the multi-professional assessment team. However, although the majority of the participants were unsure about the inclusion of criminologists, only two participants had ever had

an encounter with a criminologist. One experience was negative, while the other one was positive.

One probation officer said:

My ondervinding met 'n kriminoloog was nie baie positief nie. Hy het so onlangs soos hierdie jaar (2015), betoog dat die criminal capacity van kinders verlaag moet word na sewe jaar. [My experience with a criminologist was not very positive. As recently as this year (2015), he advocated that the criminal capacity of children should be reduced to seven years.]

Doubt about the inclusion of criminologists in a multi-professional assessment team was also shared by probation officers.

Die fokus van 'n kriminoloog is nog te veel op punitive. [The focus of a criminologist is still on punitive.]

Hulle neem nie die ontwikkeling van die kind in ag nie. [They don't take the development of a child into account.]

As mentioned previously, some of the psychologists argued against the inclusion of criminologists because of their opinion that psychologists and psychiatrists are the only professionals qualified to conduct criminal capacity assessments

I only know that the only people who do in-depth interviews and the integration of information of a person's life from multiple aspects are clinical psychologists and psychiatrists.

According to a psychiatrist, a child's mental health is a crucial factor in assessing criminal capacity and the skills required to establish this, are clinical. She furthermore stated:

I think that, in our context, criminologists would be best utilised in crime reduction/prevention programmes – which

would in turn reduce our workload – and equally importantly, policy development and research, especially in the spheres of justice, education, health, early childhood development, community development etc.

A prosecutor who was also against the inclusion of criminologists within a multi-professional team, argued that:

I don't think criminologists have the necessary experience and engagement with children to be able to compile the reports. If criminologists should be included then we might open the can of worms and include sociologists, anthropologists, paediatrics, and everybody that studied psychology and sociology.

In contrast to the aforementioned opinions expressed, other participants who included a magistrate, a prosecutor and an advocate, and who had had a positive encounter with a criminologist, stated the following:

I had the opportunity to work with a criminologist, this was a case of a serial rapists...the criminologist came and he did a full assessment on the request of the state, he gave us such a broad insight into the mind of the serial rapist, he gave us a document like this (indicating a comprehensive document). When he came to court, I mean I could not ask him one question, it was detailed, and it was so precise. I think the role of criminologists is absolutely needed, they should be employed in all areas of the Criminal Justice System not only Child Justice.

According to my opinion of criminologists, they might be the best profession to conduct criminal capacity assessment.

I really don't know what they do, I mean I only see them on television. I like to listen to them, they know crime and

criminal behaviour. I don't know why the courts don't use them.

I think they can do pretty much the same as what a social worker can do. As long as criminologists are trained in interviewing people.

Compared to the opinion of the other psychologist, one psychologist argued that the role of criminologists should be considered as vital in the Criminal Justice System. According to her, she could not understand why criminologists are not used for criminal capacity assessment on a regularly basis.

We are not using the guys (criminologists) that hold the speciality field. I don't know why criminologists have not been used in these spaces before.

The question if criminologists could play a role in the assessment of a child offender's criminal capacity assessment, received mixed results. The researcher deemed it important to establish the reason for these diverse responses.

The following responses came to the fore:

I have no idea what criminologists do or take into consideration when they come to their conclusions.

Dis mos die teorie van crime, die oorsake en die consequences van crime. [It is the theory of crime, the origins and the consequence of crime.]

Hulle weet hoekom mense crime doen. [They know why people commit crime.]

Baie kriminoloë is ge stuck, hulle dink as die kinders betrokke is by 'n misdryf is die gevolg, en hulle studies toon dit, die kind gaan op eindig by Pollsmoor of waar ookal.
[Many criminologists are stuck on an idea; they think that if

children have committed a crime, and their studies indicate this, the child will end up in Pollsmoor, or somewhere.]

When the researcher offered an explanation of what the study field of criminology entails, the majority of the participants (with the exception of three participants) changed their opinions to be in favour of the inclusion of criminologists in a multi-professional team to assess the criminal capacity of children in conflict with the law. The participants who did not support the inclusion of criminologists, mentioned the following reasons:

No matter how much knowledge one may possess about the causes of crime in individuals and societies, it is not possible to make a clinical assessment without clinical skills.

Criminologists usually work with adult offenders and might have some exposure to children, but I don't think it is sufficient to be able to analyse cognitive, social, psychological and educational developments of children.

It became evident during the study that the participants were not familiar with the study field of criminology and what criminologists do, and as a result of this the majority of the participants were initially against the inclusion of criminologists within a multi-professional assessment team. It was confirmed when, after an explanation of the study field of criminology had been offered to participants, the majority of the participants (except three) changed their opinions in favour of the inclusion of criminologists within a multi-disciplinary assessment team.

In addition to highlighting the participants' opinions about the process and the role players who are (and should be) involved in the criminal capacity assessment process, a number of concerns were also raised by the participants. These concerns are of relevance for the study because they could have severe implications on the effective execution of the various stages of the Child Justice System, and in turn hamper the best interest of the child. These factors are addressed in the section below.

4.2.2 FACTORS THAT COULD HAMPER THE BEST INTEREST OF THE CHILD

In addition to the questions posed, participants raised their concerns about the current criminal capacity assessment process. The researcher deemed these opinions relevant to the study, since they may add insight into the various areas directly related to the best interest of the child.

4.2.2.1 The time allocated for the assessment process

According to section 35(a-i) of the CJA, the assessment process requires that a probation officer evaluate the child's development milestones and competencies, the history and family circumstances of the child, as well as the circumstances that surrounded the offence and the impact the offence had on the victim.

Probation officers furthermore have to establish a possible reason(s) for the child's involvement in the alleged offence(s), and express a 'view' on the possible influence that adults or peers played in the child's behaviour and committing of the alleged offence. Findings of this study indicate that the time period allocated for the general assessment process is not regarded as adequate and that participants felt the completion of criminal capacity check lists (Annexure E) only adds an additional burden.

One advocate and a magistrate stated the following:

Let me just say, the process is so fast, it so quickly it is like cattle, yes like cattle, where is the mommy, where is the daddy, and it just goes like that, they are not really sitting down and applying their minds to assess this young child, why is he committing crimes.

Probation officers have to make various calls to gather additional information, but they don't do it, they don't have the time to do it.

Not enough time is given. They are worried about the court roll.

Decisions are made very hastily, for example they see the child at 9 am and at 2, the child appears before the court, and they call that assessment.

According to another magistrate:

We need a detailed assessment report from a probation officer, there is simply not enough time.

What we are forced to do now is to refer the child to the Child Justice Court, and postpone it there for a longer period. That is just counterproductive, we don't want to get them in the Child Justice Court; we are forced to this to buy the time.

I am now using Section 28 of the Constitution and postponing it (cases) in the best interest of the child.

It is clear that probation officers cannot pay the necessary attention to assessments, because of multiple restrictions. Operational and logistical challenges such as the shortage of probation officers, an ineffective assessment proforma, and the period allocated for assessment, make it difficult to compile a comprehensive report as requested by the CJA. It is furthermore evident that the aforementioned factors will have a direct influence on the quality of assessment reports. These are all factors that are not in the best interest of the child in conflict with the law.

4.2.2.2 Assessment tools and the quality of assessment reports

As indicated previously, concerns were raised by the participants about the tools used for the assessment process and the quality of reports. Probation officers in the Western Cape make use of proforma check lists (Annexure E) when doing criminal capacity assessments. Concerns were also raised about the psychologists' reports.

Probation officers

As discussed in chapter 2, probation officers are responsible for the initial assessment of all children, and are required to express a 'view' on whether a further evaluation by a psychologist and/or psychiatrist would be required to assess the criminal capacity of a child. This process requires the completion of a standardised form and in some instances a criminal capacity check-list to aid the probation officer during the assessment process.

The following issues were raised regarding the check lists:

It can be misleading, indicating that all children have criminal capacity.

Ek het probeer om hierdie vorm in te handig maar dit was teruggestuur na my toe, toe soek die landdros 'n volledige verslag. [I tried to submit this form (referring to the check list), but it was returned to me; the magistrate requested a comprehensive report.]

The form was supposed to be part of the probation assessment form, it was an interim arrangement as well, it was a period when justice said they didn't have the money, or person power to appoint a psychologist.

This form is a bit redundant, not a bit, it is redundant.

Dis hoekom ek daai vorm afgehaal het, ek was bang gewees, net nou kom dit by die senior prosecutor, nee maar hier sê (participant's name), die kind het criminal capacity, nee ek het vir my landdros gese ek haal die vorm af, en toe se sy, nee dis reg. [This is why I removed the form, I was scared that it might end up with the senior prosecutor, who would say that according to (name of participant), the child has criminal capacity, no, I told the magistrate, I removed the form, and she said it was ok.]

One participant, who is a magistrate, strongly expressed his dissatisfaction with the check lists used by probation officers.

Dit is 'n (**) piece of paper, ek sal nie die (*****) in my hof toelaat nie.*** [It is a (swear word) piece of paper, I will not allow the (swear word) in my court.]

Similar to other findings, participants also raised their concerns regarding the quality of the assessment reports compiled by probation officers.

We (other prosecutors) find it extremely difficult to make informed decisions based on the hasty reports compiled by probation officers.

It contains superficial information on the child, and the reports are without substance.

I am not satisfied with the reports, I constantly send them back.

It is a thumb suck clinical opinion, and the reports are not founded on anything.

A proper assessment consists of much more than just a standardised form that needs to be completed.

I am not very satisfied with those reports, I constantly send them back. I put them on the stand and say, talk to me, tell me what your impression was and why, I just find the probation officers' writing skills not as good as their verbal skills. I find the oral evidence of the probation officer very valuable to me.

I want part of their report to be a criminal capacity report.

Contradictory to the concerns highlighted by the participants above, the majority of the probation officer participants were of the opinion that the courts found

their reports satisfactory and accepted them. However, some of the probation officers did highlight some reservations about their reports.

It is a very basic form, we (probation officers) only have standard assessment forms and we don't use any additional tools to assess a child.

You cannot change anything on the form, this is how our head office gives it to us, and this is how we are supposed to complete it.

Anyone can complete this form; you don't need to be a professional to complete this form.

There is limited stuff that we (probation officers) can provide, we can only report on what the form requests.

Psychologists

Although most of the participants indicated that they were satisfied with the reports compiled by psychologists, there were certain areas identified that could be problematic.

Ons het baie kere al sielkundige verslae terug gekry en dan deur gelee, sjoe, dan se hulle die kind is toerekeningsvatbaar, maar dan weet jy voor jou siel, die kind wat voor jou sit is nie toerekeningsvatbaar nie. [We have on many occasions received the report back from the psychologists, wow, and then they say the child has criminal capacity, but you know the child in front of you does not have criminal capacity.]

Daar word niks van hierdie goeters ingewek nie, sy intellektuele vermoëns, al daai goeters speel mos nou 'n rol. Daar is sommige verslae wat net kyk op die kognitiewe vlak, hulle dek nie die ander aspekte nie. [The intellectual abilities of a child are not included in some reports, those are

important factors, they just look at the cognitive abilities, and they don't take other factors into consideration.]

Ek sou dog die sielkundige sal die skool bel, nee hulle doen dit nie. [I would presume the psychologist would contact the school, no they don't do that.]

I have no problem with their reports, I only think they are pro-psychology, everything is about the child's psychological behaviour, I mean, it seems that all children have psychological issues.

The concerns highlighted by the participants are predominantly about the one-dimensional nature of the report and the lack of information about other aspects relating to the functioning of the children.

In addition to the quality of the assessment reports, the psychologists mentioned that they were concerned about the current assessment tools available to them.

The following concerns were highlighted by the psychologists and a psychiatrist who participated in the study:

There are no standardised tools in South Africa for assessing criminal capacity as a whole. We make use of standardised psychometric tests to establish cognitive development and use internationally accepted frameworks for moral development.

The IQ test usually used is the SSAIS-R conducted in either English or Afrikaans. When the child is Xhosa speaking we use an interpreter experienced in interpretation in the mental health. This does weaken the reliability of the IQ assessment.

A psychologist concurred that the current assessment tools can be problematic if utilised on a diverse multi-cultural South African society.

The problem with many of the tools we use in South Africa is, they are not standardised on the South African population, and if they are standardised, it is on very, very small sample sizes.

We just add 10 points to the overall assessment to try and standardise it; that is also problematic.

The problems highlighted by the psychologists and psychiatrist regarding the current assessment tools utilised in South Africa, emphasise the need for the development of a standardised assessment instrument that could be used in a multi-cultural context.

4.2.2.3 Additional training

Some participants also indicated the need for additional training for probation officers. This will be discussed henceforth.

Probation officers

During an individual interview, a probation officer indicated that only after her honours qualification in probation work, she felt more equipped to deal with a child offender. As indicated previously, a large number of participants in this study pointed out that they were not satisfied with the assessment reports compiled by probation officers and were of the opinion that additional training could improve the quality of the probationers' reports.

A psychologist remarked:

There are free criminal capacity tools on Google that can be adapted for probation officers.

I think we set them up for failure; they don't have the tools to assess child offenders.

Two prosecutors and one magistrate strongly supported the need for additional training of probation officers.

Nee wratig man hulle werk is swak, wie leer hulle? [Their work is not of a good quality, who trains them?]

Ek het mos vir jou gesê ek stuur hulle verslae terug, wat dink jy, dink ek van die (**) goed. Hulle moet wratig iewers addisionele opleiding kry. [I told you I return their assessment reports, what do you think my opinion is of their (*****) reports? They need additional training.]***

Yes, for sure, I mean just look at the reports; is that not sufficient evidence, they do need training. I mean I hate to work like this; everything is just a battle with probation officers.

The need for additional training was also identified as being relevant to psychologists. When the quality of the assessment reports came to the fore, mention was made by the psychologists that they were concerned about the current assessment tools available to them, and that they lacked certain skills.

None of us (psychologists) are trained to it. I think last year (2014) was the first time two people started training in forensic psychology in our country. We don't have a forensic psychology specialisation as yet.

In South Africa we train ourselves, some of us (psychologists) who were fortunate to land up in Correctional Services, the next thing there, you are the forensic psychologist, you assessed three prisoners you must be an expert.

In forensic assessment, you have to do your own research on the internet.

We (psychologists) have child development, we have the psychopathology, emotional and moral development, but we have nothing in criminology or criminal behaviour.

There are passionate people (psychologists) who really try and figure out what to do.

The inadequacy of effective assessment tools available to psychologists is an area that will have to receive serious attention. Furthermore, the need to address the current concerns of various participants regarding the quality of the assessment reports compiled by probation officers, cannot be ignored. Apart from other areas identified in this study, the aforementioned issues are damaging to serving a child's best interest, which is unacceptable.

4.2.2.4 A shortage of practitioners to conduct assessments

The shortage of probation officers, psychologists and/or psychiatrists, was raised by various role players as an aspect that also hampers the effective delivery of services to children in conflict with the law.

Probation officers

Regarding the shortage of probation officers, one magistrate stated:

There is always a shortage of probation officers, if you look at the court today for example, we have six cases that need assessment, and this might not sound like a lot, but these probation officers need to write the reports, and they work against time. Children that will be detained need to be transported to the various facilities.

Dit is baie jammer dat ons in Suid-Afrika nie meer geld het vir proefbeamptes nie. [It is a pity that we don't have more money in South Africa to appoint probation officers.]

Die hele Wet is gebalanseer op proefbeamptes. En omdat daar altyd 'n ewige durende tekort is aan proefbeamptes, sukkel ons almal. [The whole Criminal Justice Act is based on the services of probation officers, and due to shortages we all battle.]

The current shortage of probation officers in the Child Justice System not only affects other role players in the execution of their responsibilities, but it is evident that this shortage will have a severe influence on the time spent with child offenders during assessment, which in turn will hamper the best interest of the child.

Psychologists and psychiatrists

The shortage of psychologists and psychiatrists also became evident during the interviews. A psychiatrist indicated that they are already making reservations for criminal capacity assessments in 2016; this was recorded at the time of writing the dissertation in September 2015.

One psychologist said:

I spoke to a lawyer, I think it is in Mpumalanga, they can't find a psychologist, there is such a backlog, and they don't know what to do with all these cases.

It was reported by numerous participants that they are aware of cases where children were assessed years after the alleged offence had been committed.

I had a case of a child who committed an offence when he was 15 or 16; I saw him when he was 18. How could I determine criminal capacity?

The psychologists and psychiatrist indicated that they could only set aside one day per week to conduct assessments, due to their various other responsibilities, for example being in a private practice. There is currently only one psychiatrist and two part-time psychologists assigned in the Western Cape to conduct criminal capacity assessments. These shortages constitute a violation of the basic human rights of children in conflict with the law to be treated fairly. Assessing children six or eight months after committing the alleged offence, is not conducive to a fair assessment and can affect the results obtained during the assessment.

4.2.2.5 Operational aspects that could influence the best interest of the child

Concerns were raised during the focus group interviews regarding the non-compliance of some of the role players with the provisions of the CJA. For example, some participants indicated that some magistrates had their own interpretations or opinions regarding some of the provisions as set out by the CJA, and additionally did not adhere to some of these provisions.

Magistrates

The first issue that was raised by a participant is that some magistrates still wear their robes in court. This was also personally experienced by the researcher when she attended a preliminary hearing in one of the courts in the Western Cape. Secondly, it was observed by a participant that children are standing at the door of the court room when a preliminary inquiry is held. Section 47(1) of the CJA stipulates that the inquiry magistrate must conduct the preliminary inquiry in an informal manner. Although the CJA does not require magistrates to conduct the preliminary inquiry without their robes, it will be in the best interest of the child to create a child-friendly environment to encourage the child's participation.

Secondly, during the preliminary inquiry, the CJA stipulates in section 47(2) that the inquiry magistrate must in the prescribed manner explain various important aspects pertaining to the child in conflict with the law. It is unclear how a magistrate could expect to achieve the set goals stipulated by the CJA when children are standing at the door. All the necessary areas that need attention during the preliminary inquiry cannot be addressed in this manner.

One participant also made mention of the way some magistrates conduct preliminary inquiries. She stated:

They rush through these cases.

In addition to the aforementioned conduct of certain magistrates, during a personal interview the researcher encountered the following remark by a magistrate regarding the current criminal assessment procedure.

Now I tell you, the previous method to establish criminal capacity was still the easiest. How did we prove it, the headmaster testified, the mother testified, the teacher testified. Who knows best if the child has criminal capacity? The child himself. Why can't we ask the child upfront, do you know it is wrong to steal; if he answers yes or no (say he answers yes), then we just need to ask something else to establish if he is aware of the consequences.

At this stage, what is the process, we send them to psychologists, to probation officers, I don't know if a probation officer can establish criminal capacity by asking a couple of questions, that is dangerousness, I would say.

I would be more satisfied if we could rely on the testimony of the mother, we have done it all these years and nothing was wrong with it.

Although the current method employed to establish criminal capacity of children in conflict with the law may need revision, especially in certain areas as previously indicated, criminal capacity should be established by professionals equipped to understand the development and the causation of criminal behaviour. Magistrates are not trained to appreciate the influence of various factors that can contribute to a child's involvement in criminal behaviour. Additionally, asking a parent if a child has been taught the difference between right and wrong does not address the crucial aspect of a child's capacity to understand the consequences of certain behaviour. Furthermore, some parents or caregivers may not be knowledgeable to understand the consequences of such an admission. Remarks as discussed above raise serious concerns and should be regarded as a serious infringement on the rights of children in conflict with the law.

SAPS

It was mentioned during the interviews that one of the participants was aware of an incident where an alleged child offender was transported in the back of a police vehicle. Apart from this, other concerns were also raised pertaining to the treatment of children in conflict with the law.

In some instances, children are wrongfully put in police cells; the act says when the child is under the age of 10, the child cannot be held in the cells; some police officers are still doing it. They still contain children in police cells for up to three days before a probation officer gets notified.

A magistrate expressed her dismay with the interpretation of schedule 3 offences by some members of the SAPS

What is very confusing for the police, and it is always causing arguments, is that there should be more direct clarity on the schedule 3 offences, the child cannot be released by the police. You cannot release a child on a murder, kidnapping and rape.

Although it is indicated by the Department of Justice and Constitutional Development (2012-2013:17), that a number of Child Justice Personnel have been trained, it is not clear what the training entailed. It is important that various role players are made aware of the important value of professional criminal capacity assessments by suitably qualified persons, and the reasons why certain provisions are essential to uphold in the best interest of the child.

4.3 CONCLUSION

This chapter presented findings that were collected during focus group and personal interviews. The study indicated that the current process followed to determine the criminal capacity of children in conflict with the law, does not uphold the best interest of the child. It was established in this study that the assessment tools utilised, reports compiled by probation officers, the severe shortage of probation officers and psychologists and/or psychiatrists, and the

time allocated to probation officers to conduct assessment, severely hamper the best interest of the child. It was furthermore established that it would be in the best interest of the child that criminal capacity assessments are conducted by a multi-disciplinary team consisting of probation officers, social workers, psychologists and/or psychiatrists and criminologists. The following chapter will provide the interpretations, conclusions and recommendations of the study.

CHAPTER 5

DISCUSSIONS OF THE FINDINGS AND RECOMMENDATIONS

5.1 INTRODUCTION

One of the primary objectives of the CJA is to recognise the individual needs of children who come into conflict with the law. This aim was achieved by providing such children with special processes and procedures in order to ensure that the best interest of the child is recognised and considered in all decisions taken (Department of Justice and Constitutional Development 2010a:14). One of these provisions is contained in section 7(2) of the CJA, which stipulates that children between the ages of ten and 14 years are presumed to lack criminal capacity, and if the State wishes to prosecute the child, they have to prove beyond reasonable doubt that the child possessed the capacity to appreciate the difference between right and wrong at the time of the alleged offence, and secondly that they could act in accordance with this understanding.

The enactment of the CJA section 97(3) stipulated that the Minister of Justice and Constitutional Development should identify professionals deemed competent to conduct the evaluation of criminal capacity for children in conflict with the law. The persons identified by the Minister of Justice and Constitutional Development can be found in the provisions of section 11(3) of the CJA (Act 75 of 2008) which requires that psychologists and psychiatrists who are registered under the Health Professions Act, 1974 (Act 56 of 1974), conduct the criminal capacity assessment of children in conflict with the law. Psychologists and psychiatrists are currently the only professionals designated by the CJA to conduct these assessments.

The two aforementioned provisions stipulated in the CJA, firstly the best interest of the child, and secondly the provisions of section 11(3) that only designate psychologists and/or psychiatrists to conduct criminal capacity assessments, are of interest in this study. In light of this, the aim of this study was to explore if the unique skills set associated with the criminology profession, could be utilised to conduct criminal capacity assessments of children in conflict with the law. Two objectives were explored. Firstly, to determine if the current process

utilised to establish criminal capacity is in the best interest of the child. This entailed an analysis of the current assessment process and methods employed by probation officers, psychologists and psychiatrists. The second objective was to establish if criminologists could be utilised to conduct criminal capacity assessment as part of a multi-disciplinary team.

In the present chapter the researcher will illustrate how the aim and objectives of the study were achieved. The chapter will include a summary of the research methodology, limitations of the study, and a discussion of the findings of the study that were presented in chapter 4. It will conclude with recommendations and areas identified for future research.

5.2 SUMMARY OF THE RESEARCH METHODOLOGY

“An exploration of the criminologist’s role in establishing the criminal capacity of children in conflict with the law” is an explorative and descriptive study in nature, and a qualitative approach was utilised. Data were collected through individual and focus group interviews with the aid of a semi-structured interview schedule. The findings derived from this explorative and descriptive study have a practical application, which is distinctive of applied research.

As indicated in chapter 1, except for the work of Badenhorst (*Criminal capacity of children* 2006), no previous research could be located that had specifically focused on the criminal capacity assessment process, which included the utilisation of criminologists within a multi-disciplinary assessment context. This study commenced with a literature survey of relevant criminological theories, followed by semi-structured interviews. The data collected included information from five questions asked to participants, as well as data collected from further information and comments made by the participants during the interview process. The additional information was found to be relevant to the research aim and the objectives of the study, hence it was included and integrated as part of the findings. The data collected were analysed and evaluated according to the aim of this study.

It is important to consider the findings of the research in light of the limitations of the study. The following limitations were identified:

Although a number of articles could be located on the topic of criminal capacity assessment of children in conflict with the law and the provisions as set out by the CJA, limited literature was available on the criminal capacity assessment process executed by psychologists, psychiatrists and probation officers.

Only one psychiatrist and three psychologists are currently responsible for the criminal capacity assessment of children in conflict with the law in the Western Cape, hence interviews could only be conducted with them. The rest of the sample, consisting of probation officers, prosecutors and magistrates, was also not representative. The deficiency in the sample was overcome by using a two-pronged approach during data collection, namely firstly interviews, followed by focus group interviews. This phased approach ensured that data saturation was achieved for the specified unit of analysis.

The unit of analysis consisted of participants in the Western Cape, thus the findings are not representative of all provinces in South Africa, since other provinces might yield different results.

5.3 DISCUSSION OF THE RESEARCH FINDINGS

The results and findings identified in chapter 4 were interpreted to answer the research questions as identified in chapter 1. In correlation with the aim and objectives, the research aimed to explore if the current criminal capacity assessment approach, where only psychologists and/or psychiatrists are utilised, can be deemed adequate and in the best interest of the child. Secondly, the study explored if criminologists could be included in the criminal capacity assessment process. The following themes were identified from the findings:

- Psychologists and psychiatrists are best qualified to conduct criminal capacity assessments of children in conflict with the law.
- Psychologists and psychiatrists utilise ineffective assessment tools during criminal capacity assessments.
- Psychologists lack certain knowledge to effectively conduct criminal capacity assessments.

- Psychologists and psychiatrists have a one-dimensional criminal capacity assessment approach.
- Probation officers' assessment reports are not comprehensive.
- Probation officers lack training to determine the criminal capacity of children in conflict with the law.
- Criminal capacity assessment should be conducted within a multi-disciplinary approach.
- The current shortage of role players in the assessment process hampers the best interest of the child.
- Time allocated for initial assessments is not adequate.
- Criminologists should be utilised in the criminal capacity assessment process.
- The study field of criminology is unfamiliar to the role players in the Criminal Justice System.

The above themes identified will now be addressed.

5.4 OBJECTIVE 1:

ESTABLISHING IF THE CURRENT CRIMINAL CAPACITY ASSESSMENT PROCESS IS IN THE BEST INTEREST OF CHILDREN IN CONFLICT WITH THE LAW

In order to achieve the first objective of the study, questions were asked if the current assessment approach being utilised in the CJA is deemed to be in the best interest of the child, and if there is scope for additional role players in the criminal capacity assessment process. In chapter 4, the researcher referred to the provisions as set out in section 11(3) of the CJA that only psychologists and psychiatrists were designated to conduct criminal capacity assessments.

As previously discussed in chapter 2, the purpose of the criminal capacity assessment process, and also the methods and tools utilised by psychologists and psychiatrists to establish criminal capacity, differ from those conducted by probation officers. The first theme identified will be discussed henceforth.

5.4.1 Psychologists and psychiatrists are best qualified to conduct criminal capacity assessments

Findings from the study identify psychologists and/or psychiatrists as the two professions that are perceived by participants to be best qualified to conduct criminal capacity assessments.

In order to practise as a clinical psychologist in South Africa, a person must hold a master's degree in psychology offered by an accredited University. Students who wish to complete a master's degree in psychology go through a stringent selection process (Zwemstra 2009). Course work is followed by an internship and a year of community service, where after they may register in the category of Clinical Psychologists Independent Practice with the Health Professionals Council of South Africa (HPCSA). Psychologists study and explore areas of perception, cognition, emotion, personality, behaviour and interpersonal relationships. Psychologists also attempt to understand the role of mental functions in individual and social behaviour, including the exploration of underlying physiological and neurological process (Zwemstra 2009). It should be noted that the study of crime and criminal behaviour is generally not part of psychologists' study curriculum.

Psychiatrists in turn are medical practitioners who have specialised in the field of psychiatry. The qualification takes six years to complete. Internship follows and thereafter South African doctors are obligated to complete a year of community service. Specialisation to become a psychiatrist takes another four years before the practitioner is qualified as a psychiatrist. To be able to practise as a psychiatrist, a person must be registered with the HPCSA as a psychiatrist under the specialists register (Zwemstra 2009). The medical science discipline specialises in mental illness, using a biomedical approach.

Apart from the evaluation of the patient, psychiatrists are one of few mental health professionals qualified to prescribe medication for psychological disorders (Zwemstra 2009). These qualifications provide evidence to the fact that psychologists and psychiatrists are highly trained professionals that should be involved with the criminal capacity assessment process of children in conflict with the law. Nonetheless, as previously discussed, an all-encompassing study

of crime and criminal behaviour generally does not form part of psychologists' and psychiatrists' curriculum.

Although the role and function of psychologists and psychiatrists were acknowledged in this study's findings, as well as from the literature, challenges were identified that could hamper the effective assessment of children in conflict with the law. The challenges included ineffective assessment tools currently utilised, and a lack of training and knowledge in certain key areas such as criminology, criminal behaviour, juvenile delinquency and working with children. In addition, a one-dimensional approach during assessment, predominantly on medico-legal aspects, was also identified as an element that could hamper the effectiveness of criminal capacity assessments. These challenges were identified as factors that are essential to explore further.

5.4.2 The utilisation of ineffective assessment tools during criminal capacity assessments

The second theme identified pointed to the findings that the current assessment tools utilised by psychologists and/or psychiatrists are not effective, hence they are not in the best interest of the children in conflict with the law. Pillay (2011:42) confirms this and points out that there is a lot of criticism against applying psychological assessment tools in a multi-cultural South African context. According to Pillay (2011:42), the current methods utilised are borrowed from the West and are not relevant for utilisation with children living in South African rural areas. This is predominantly because terminologies, such as a thermometer that is used in the intelligence test, are not familiar to these children. Tests are also simply adapted to 'fit' the South African needs (Pillay 2011:42). This was confirmed in the findings and literature presented in the current study. In chapter 2, it was explained that the reliability and validity of the psychological tests currently used are reduced in cases of children whose first language is not English, such as for example Xhosa-speaking children. Interpreters are used in these cases, which influences the validity and reliability of psychological tests. During the interview a psychologist mentioned that: "We just add 10 points to the overall assessment to try and standardise it; that is also problematic."

Utilising ineffective assessment tools cannot be considered to be in the best interest of children in conflict with the law.

In addition to the challenges experienced with the tests used in criminal capacity testing, another challenge that was identified as a practice that denies children access to the protective mantle as intended by the CJA, is that psychologists lack certain skills and knowledge, as discussed next.

5.4.3 Psychologists lack certain knowledge to effectively conduct criminal capacity assessments

As mentioned, section 11(3) of the CJA refers to psychologists and/or psychiatrists as 'suitably qualified' persons to conduct criminal capacity assessments. However, the findings of this study indicate that psychologists lack certain expertise relating to juvenile delinquency and child justice, such as found in the field of criminology: "We (psychologists) have child development, we have the psychopathology, emotional and moral development, but we have nothing in criminology or criminal behaviour." These skills could benefit them during the assessment process and provide them with in-depth knowledge regarding criminal behaviour. It is proposed in this study that such knowledge is essential, as will be explained below in section 5.4.4. It was also established that there is currently no formal training available to psychologists in South Africa to specialise as forensic psychologists: "We don't have a forensic psychology specialisation as yet." Expertise in the field of forensic psychology is obtained through experience working in this field.

In light of the findings it can be asked if additional training in the field of criminology could address this void in psychologists' skill set.

Another theme with regard to the assessments done by psychologists and psychiatrists identified the one-dimensional nature of the current criminal capacity assessment process. This area will be addressed henceforth.

5.4.4 The one-dimensional nature of psychologists' and psychiatrists' criminal capacity assessments

In chapter 2, the researcher referred to the requirements of the CJA in section 11(3) regarding the criminal capacity assessment of children in conflict with the law, which entails an evaluation of the cognitive, moral, emotional, psychological and social development of the child. These areas are all important in a child's development and as such also relevant in determining if a child has criminal capacity or not.

The findings indicate that psychologists' and/or psychiatrists' criminal capacity assessments are one-dimensional, since they mainly focus on the cognitive and mental health aspects of the child in question. As a result, the danger exists that other equally important areas of the child's development are neglected (Badenhorst 2006:124). In this regard, Badenhorst (2006:124) emphasises that utilising only certain professionals might result in a situation where some of the developmental factors are over emphasised at the expense of other equally important factors.

To provide an example, although the Moral Development Model formulated by Kohlberg (in Papalia, Olds & Feldman 2006:444) serves as a guide in child development, what is equally important is the impact of cultural values on a child's moral development. A holistic approach is thus in the best interest of child offenders in determining if they have criminal capacity. As pointed out by Badenhorst (2006:163) and Van der Hoven (2001:16), cultural practices, norms and values may have an impact on the ability of a child to distinguish between right and wrong, and to act in accordance with this ability. As pointed out in chapter 3, children acquire knowledge through learning, and the research of Akers provides evidence to the fact that in many instances learned behaviour dictates the actions of children. This is quite relevant to children who find themselves in conflict with the law. In order to overcome the problem of one-dimensionality, this study contends that relevant criminological theories, such as that of Gottfredson and Hirschi, Akers, Farrington, and Thornberry, should be considered when conducting assessment of criminal capacity.

Petrus (2010:59) points out that psychology should not be used at the expense of other aspects or dimensions such as cultural beliefs, since many crimes committed in South Africa are not necessarily psychologically motivated. In some societies certain acts are not perceived as a crime, but are rather regarded as an important transition from one social status to another (Petrus 2010:59).

The multi-dimensional nature of criminal causation, as highlighted in this study, points out that a one-dimensional approach in criminal capacity assessments cannot be considered to be in the best interest of the child.

As previously discussed in section 5.4, the purpose of assessment, and the tools utilised by psychologists and/or psychiatrist during assessment, differ from those used by probation officers. Findings from this study also highlight the inadequate quality of reports compiled by probation officers due to the lack of training and expertise in certain areas. This is regarded as a factor that impacts negatively on the effectiveness of criminal capacity reports. The current proforma assessment form (Annexure D) and check lists (Annexure E) used by probation officers to express a 'view' on the child's criminal capacity, are problematic and do not serve the best interest of the child. These themes identified are discussed below.

5.4.5 Probation officers' assessment reports are not comprehensive enough to encompass the multi-dimensional nature of factors associated with the determination of criminal capacity

As highlighted in chapter 4, probation officers play a vital role in the Child Justice System, especially in light of the interventions and recommendations made with regard to child offenders by probation officers. It was established in this study that the majority of the participants had concerns regarding the quality of the assessment reports compiled by probation officers (see 4.2.2.2). In light of these findings, it is important to examine the stipulations of the CJA regarding the contents of these reports.

In accordance with section 13(1) and (2) of the CJA, probation officers are expected to: estimate a child's age; gather information regarding previous

offences; formulate recommendation for release, detention or placement; determine if a child is in need of care and protection; establish prospects for diversion; and express a view on the possible criminal capacity of the child and whether expert evidence would be required in relation to the criminal capacity of the child. Any additional information regarded to be in the best interest of the child also needs to be included in the assessment report. An assessment report must also indicate if the child is acknowledging responsibility for the offence, which is relevant to determine whether the child is eligible for diversion (Gallinetti 2009:39).

In order to achieve the aforementioned goals, probation officers are provided by DSD with a standardised proforma form (Annexure D) to use for the assessment. However, as found in this study, the proforma assessment form is not adequate or detailed enough to meet the requirements as stipulated in the CJA. Furthermore, apart from the 'check lists' (Annexure E) supplied to probation officers in some courts, there are no provisions made in the proforma assessment form to indicate the criminal capacity of a child who is alleged to have committed an offence. It can therefore be concluded that the current assessment approach does not allow for a comprehensive, holistic, in-depth evaluation of children, and as one participant in this study rightfully argued: "...assessment is much more than just completing a standardise form."

It is furthermore unclear why the legislature would require of probation officers to express a 'view' on the criminal capacity of children, if only 'suitably qualified' persons are designated to conduct the assessments, as indicated in section 11(3) of the CJA. If the State wishes to proceed with criminal charges against the child, criminal capacity has to be proven beyond reasonable doubt. The perceived value of the 'view' expressed by a probation officer in the assessment of an alleged child offender's criminal capacity is questionable in this regard.

With regard to the criminal capacity 'check lists' still being utilised in some courts, multiple concerns (see section 4.2.2.2) were raised about their validity and reliability, hence findings indicate that using the existing check list is not in the best interest of children in conflict with the law.

5.4.6 Probation officers lack training to determine the criminal capacity of children in conflict with the law

The findings in this study indicate that probation officers currently lack expertise and knowledge to effectively conduct criminal capacity assessments (see 4.2.2.3). Probation officers, as mentioned in chapter 2, are qualified social workers. Unfortunately, as Gxubane (2008:13) rightfully argues, this does not qualify or equip the practitioner to execute probation work successfully. It was also established that the post-graduate qualification in probation work does not focus on training pertaining to criminal capacity assessment.

According to Graser (in Gxubane 2008:13), probation work is a specialised field which requires specialised knowledge. Gxubane (2008:13) argues that it is therefore essential that probation officers receive further training in certain aspects such as criminal law and procedures, treatment of offenders, the objectives of punishment and criminology (Gxubane 2008:13). It was established in this study that probation officers generally have limited knowledge of criminology and what the study field entails. As in the case of psychological assessment, a one-dimensional assessment process cannot be regarded to be in the best interest of the child when children are only assessed from a social work perspective alone. As discussed in section 5.3.1.3, various factors contribute to criminal offending, and finding causation of criminal behaviour only within a social context will not afford the child with a holistic assessment approach, which is necessary to uphold the best interest of the child.

The unique expertise of each profession that contributes to criminal capacity assessment is acknowledged in this study. It is furthermore recognised that though psychologists, psychiatrists and probation officers do have profession-specific expertise, and are regarded as experts in these areas, they also lack certain knowledge associated with the field of crime and criminality. This knowledge can be found in the profession of criminology. The question should be asked if it will be in the best interest of child offenders to train all professionals where a lack of knowledge was identified, or if each profession should be

allowed to contribute its expertise in the best interest of children in conflict with the law.

In order to achieve the first objective of this study the researcher also had to explore if there was scope for additional role players in the criminal capacity assessment process. It was established that there was indeed scope for additional role players and that criminal capacity assessment should be conducted within a multi-professional context.

5.4.7 Criminal capacity assessment should be conducted within a multi-professional context

Although the findings indicate that participants were of the opinion that a multi-disciplinary approach will serve the best interest of child offenders, they found it challenging to identify role players suitable to be included in the assessment process (see 4.2.1.3). Participants also highlighted that the specialisation areas of psychology should remain central in the criminal capacity assessment process.

As the researcher discussed in sections 5.4.4 and 5.4.6, it is important that other professionals such as criminologists are included and utilised during the criminal capacity assessment process. This is also argued by Badenhorst (2006:124), who states that “it is clear that criminal capacity assessment should be determined and assessed from a multi-disciplinary point of view”. Badenhorst (2006:124) points out that if the criminal capacity assessment process is reserved only for one profession, it will delay assessments and would not be in the best interest of children in the Criminal Justice System.

Apart from the aforementioned themes identified, it became evident that certain operational aspects could hamper the best interest of the child. The themes identified were the shortage of probation officers (social workers), psychologists and/or psychiatrists, as well as the time allocated to probation officers to conduct assessments. This will be discussed below.

5.4.8 The current shortage of role players in the assessment process hampers the best interest of the child

In chapter 1 the researcher pointed out that South Africa is currently experiencing a shortage of social workers (probation officers), psychiatrists and psychologists. This was confirmed by the research, and the findings indicate that this shortage hampers the best interest of the child.

Probation officers

Probation officers play an essential part in the successful implementation of the CJA (Badenhorst 2011:17). The shortage of probation officers was noted as an aspect that hampers the effective implementation of the CJA. It was also highlighted as having a negative impact on criminal capacity assessments. Probation officers are social workers who have specialised in probation work; in other words the shortage of probation officers is a direct result of the shortage of social workers in general (Badenhorst 2011:17). In spite of this shortage, only social workers are permitted by legislation to be appointed as probation officers (Gxubane 2008:12; Skelton & Tshehla 2008:35; Waterhouse 2008:31). As found in this study, and also pointed out by Moloi (2012), this shortage severely hampers the implementation of crucial welfare and social legislation. According to Loffell, Allsopp, Atmore and Monson (2008:50), there are clearly not enough social workers in South Africa to deal with the huge demands for services to address issues caused by widespread social problems.

Though attempts were made by the DSD to address and eradicate the shortage of probation officers in the long term, not much has changed since the implementation of the CJA. As pointed out in chapter 1, Badenhorst (2011:17) argues that consideration should be given to identify other suitable persons to assist and offer a solution to the current shortage. Badenhorst (2011:17) proposes that final year or honours social work students, criminology graduates, and graduates with psychology majors, be considered to fulfil some of the functions of probations officers. This may indeed offer a solution to the current shortage, but in addition it may also offer an opportunity for criminologists and other professionals to enter the Criminal Justice System, providing a more balanced approach to children's rights.

Probation officers can be found in all spheres of the Criminal Justice System and Holtzhausen (2011:28) rightfully states that “finding the same professional working with the same client system but in different settings at different times, claiming to be someone else...leads to doubtful validity of a scientific discipline”. It almost appears that with the admission of social workers into all the areas of the Criminal Justice System the legislature intended for social workers to become a ‘one-stop solution’ to all aspects concerning human or criminal behaviour.

There is a real need to find alternatives to deal with the shortage of probation officers in the Criminal Justice System, but additionally there is also a need to earnestly consider that there are other professionals equally equipped to deal with matters pertaining to children in conflict with the law, and who may add value to the multi-disciplinary approach being advocated.

Psychologists and psychiatrists

In addition to the shortage of probation officers, it was confirmed during the research that there is also a shortage of psychologists and/or psychiatrists to conduct criminal capacity assessments. In 2011 it was documented by Pillay (2011: 43) that there is a long waiting list to assess children. In 2015, at the time of writing this dissertation, nothing has changed and a waiting list for assessments already exists for 2016.

As mentioned previously, the shortage of psychologists has resulted in the need to use psychologists and psychiatrists in private practice, but utilising these experts to assess children is too ‘costly’ for the government. It has been argued that psychologists and psychiatrists in private practice charge expert witness fees to evaluate children in conflict with the law, and that the budget allocated for assessments would quickly be exhausted if outside psychologists were employed (Skelton & Badenhorst 2011:22). However, it appears that the larger cost involved when children are not assessed properly, is not considered. Not only will many children continue with their unlawful behaviour, and repeatedly end up in the Criminal Justice System, which is also costly, but ultimately the

price is paid by society as tax payers and victims of crimes committed by child offenders.

5.4.9 Time allocated for initial assessments is not adequate

The CJA stipulates in section 43(3)(b)(i) that a preliminary inquiry be held within 48 hours after the child's arrest, and hence the assessment must take place within this time-frame. Longer time periods are applicable in the case of children who have been given a written notice to appear or have been served with a summons. The time periods are specified in the documents (Gallinetti 2009:34).

The findings in this study indicate that the period allocated for assessment hampers the child's best interest. It appears (was not established) that the children served with a summons or written notice are only assessed on the day of the preliminary inquiry, which is clearly not sufficient time for a thorough assessment. If this is indeed the case, this process can have a direct influence on the quality of the assessment reports compiled by probation officers. This area warrants further investigation.

The second objective of this study and the themes identified will be discussed below.

5.5 OBJECTIVE 2:

DETERMINING THE ROLE CRIMINOLOGISTS CAN PLAY IN THE CRIMINAL CAPACITY ASSESSMENT OF CHILDREN IN CONFLICT WITH THE LAW

After the initial exploration to establish if there was scope for a multi-disciplinary team, the second objective was to explore if criminologists could be included in a multi-disciplinary criminal capacity assessment team. The findings will be discussed henceforth.

5.5.1 Criminologists should be utilised in the criminal capacity assessment process

The findings in this study indicate that the initial responses of the participants were not in favour of the inclusion of criminologists in the criminal capacity

assessment process. It was further established that the participants with the strongest reservations against the inclusion of criminologists also had limited or no knowledge of what criminologists do, or what the study field entails. In contrast to the aforementioned, there were a small number of participants who were in favour of the inclusion of criminologists in a multi-disciplinary assessment team. It appeared that they were more familiar with the study field of criminology or had previously worked with criminologists.

It was important to establish and clarify why certain participants were against the inclusion of criminologists. This last theme identified will now be discussed.

5.5.2 The study field of criminology is unfamiliar to the role players in the Criminal Justice System

Findings indicate that participants indeed acknowledged the value which criminologists can add to the criminal capacity assessment process, after they had been informed what the study field of criminology entails. This change in perception was brought about by the participants becoming aware of criminologists' field of expertise. These findings correlate with Maree et al (2003:80) who point out that criminologists are still excluded from the Criminal Justice System due to a general lack of understanding of the discipline and what criminology has to offer.

Equally to psychologists, psychiatrists, probation officers and social workers, who are recognised for their expertise in certain areas of human development or behaviour, so should criminologists be acknowledged. The University of South Africa (UNISA) for example requires of their students to hold a master's degree in criminology to be recognised as criminologists. This will entail a three year degree in criminology, two years in honours, and another two to three years as a master's student. During the student's studies, he or she will require a rich in-depth knowledge of the theoretical aspects of criminal behaviour, and during their honours qualification, special attention is paid to assessment practices and research aspects. Students are also provided with the opportunity to gain practical knowledge at the Department of Correctional Services.

Throughout this study, the researcher pointed out that criminologists are skilled professionals who are trained to study and evaluate the offender in all his or her facets. Attention is paid to all the facets of a person in conflict with the law, which include (but are not limited to): causal factors that contributed to the criminal event; predisposition (personality, make-up, genetic factors); precipitating factors; trigger factors; the interaction between the victim and the offender; victim vulnerabilities; victims' rights; and prevention of crime (Van der Hoven 2006:156). The study field of criminology furthermore involves knowledge of personality and sexual deviations of the offender; violent offenders; rapists; antisocial personalities; school violence (bullying); work violence; and phenomena such as muti killings, witchcraft and domestic violence (Van der Hoven 2006:156).

As previously mentioned, the CJA stipulates in section 11(3) that the cognitive, psychological, social, moral, and emotional developmental areas are addressed during the criminal capacity assessment process. Although criminologists are not permitted by legislation to diagnose personality disorders or mental illnesses, they do pay attention to psychological factors that could play a role in the causation of criminal behaviour. During assessment, criminologists will indicate that the offender displays characteristics that can be associated with certain psychological disorders. In other words, all aspects pertaining to criminal behaviour, whether moral (cultural values, religious); psychological (depression, conduct disorders); cognitive (intelligence, ADHD); emotional (substance abuse); social (gangs, dysfunctional schools and families) as stipulated by the CJA, are incorporated in criminological studies and could be utilised during assessment, which will coincide with the stipulations of the CJA. Human behaviour, specifically criminal behaviour as Hesselink (2012:135) argues, is immensely intricate, multi-faceted and complex, and based on the findings of this study this warrants the inclusion of criminologists in the criminal capacity assessment process of children in conflict with the law.

The following recommendations are now proposed, based on the findings of the study.

5.6 RECOMMENDATIONS

The Constitution of South Africa (Act 108 of 1996) clearly stipulates that the best interest of the child is of paramount importance in all decisions pertaining to a child. The CJA (Act 75 of 2008) echoes this, and advocates that the best interest of the child must be considered in all matters pertaining to children. However, the current assessment tools utilised by psychologists, psychiatrists and probation officers, the one-dimensional approach during assessment, the lack of knowledge in areas of criminology, the shortage of probation officers and psychologists and/or psychiatrists, as well as operational aspects identified, do not uphold the purpose and aim of the CJA, which is to create an individualised child-centred approach and to serve the best interest of the child. Additionally, as was proven in this study, the study field of criminology is unfamiliar to the majority of the participants in the Criminal Justice System, which can contribute to the fact that criminologists are not considered as professionals who could make practical contributions during the criminal capacity assessment process. In view of these findings, the following recommendations are proposed.

5.6.1 Criminal capacity assessment should be conducted within a multi-professional context

As indicated in section 5.4.7, the majority of the participants in this study believe that a multi-disciplinary approach during assessment is in the best interest of the child. Based on the findings, it is therefore recommended that the current process, which includes the initial assessment conducted by probation officers as well as the criminal capacity assessment process, is revised and that a multi-professional team consisting of various professionals is used to evaluate child offenders.

Based on the findings of this study it became apparent that there are areas that need to be revised within the CJA. It is also recommended that serious attention is paid to recruit dedicated role players who can specialise in Child Justice. It is the opinion of the researcher that Child Justice should be considered as a speciality field where various professionals such as criminologists, psychologists, psychiatrists, social workers and probation officers are trained and schooled proficiently to deal exclusively with matters pertaining to children.

5.6.2 The current assessment tools utilised in the criminal capacity process need to be revised

The current assessment tools utilised in South Africa by psychologists and/or psychiatrists need urgent attention and revision. Concerns were raised unanimously regarding the current instruments, and the affect this can have on the results of assessments. It is not conducive to try and modify the current instruments in an effort to accommodate a multi-cultural South African society. This, as established during the study, is not in the best interest of the child.

It is also recommended that current proforma assessment forms being utilised by probation officers to assess children, are revised. These forms do not provide for a thorough in-depth assessment necessary to establish the best possible interventions for the child in conflict with the law. The space allocated in each section to report (refer to Annexure D) is not sufficient to reflect the multi-dimensional realities associated with pshyco-social functioning of child offenders. It is also recommended that, in addition to the standard biographical information gathered, additional methods are utilised during the assessment process, for example a semi-structured interview schedule, play therapy, and functional aids, as some children can find it difficult to verbalise their thoughts and emotions and may in some instances not have the abilities to do so due to cognitive and intellectual impairments.

Based on the findings of this study it is also recommended that a serious effort is made to inform all the role players in the Child Justice System that 'check list' assessments are ineffective. The results in this study undoubtedly indicate that although some courts in the Western Cape do not utilise these check lists, other courts still insist on using them. As indicated previously, this method appears unreliable and not to be in the best interest of children.

5.6.3 A multi-professional specialised training course should be developed

Although, as previously indicated, psychologists, psychiatrists and probation officers are skilled professionals, it was established that there is a void in certain areas of their training, such as criminology. It is therefore proposed that criminologists are included in the assessment process and that a multi-

professional specialised training course is developed to address key areas such as working with offending youth and the determination of criminal capacity.

5.6.4 The need for the recognition of criminologists as skilled professionals

As previously discussed, the majority of participants in this study were not familiar with the study field of criminology and the practical role that criminologists can play. It is also evident that criminologists are not as often utilised as probation officers, social workers and psychologists in areas where they actually have speciality knowledge. Criminologists are also still regarded as crime researchers who focus on certain theoretical approaches with no or very little practical applications. Criminologists such as the late Dr Irma Labuschagne, Prof. Van der Hoven, Prof. Ovens, and Prof. Hesselink-Louw, to name a few, have dedicated their professional lives to advocate for the inclusion of criminologists in the Criminal Justice System. However, in spite of this, criminologists find it extremely difficult to gain the recognition they deserve. One of the reasons might be that criminologists cannot register with a professional body and are therefore not considered as professionals.

It is recommended in this study that criminologists are included in all spheres of the Criminal Justice System, and that they are utilised as such. It is furthermore recommended that criminologists are included within a multi-disciplinary team allocated to assess children in conflict with the law, where they can contribute and add valuable practical assistance which is conducive to serving the best interest of the child.

5.7 RECOMMENDATIONS FOR FURTHER RESEARCH

Based on the findings of the present study as well as the literature consulted, possible future research topics identified are the following:

- It is suggested that further qualitative research is done to explore the multi-professional approach of criminal capacity assessment in other provinces of South Africa. This might enable a broader generalisation of the findings.

- Further research is suggested to develop a comprehensive assessment tool to be utilised for children in conflict with the law.

5.8 CONCLUSION

Although the stipulations in the CJA can be considered as a positive step in the right direction, and it is evident that the aims and objectives are formulated to protect the rights of children in conflict with the law, certain crucial areas do require revision. Various factors were identified during this study that are not in the best interest of the child, and which can be regarded as an infringement on the rights of children. All children need to be treated in a manner that recognises their individuality and upholds their best interest, also those who find themselves in conflict with the law. When children are assessed from a one-dimensional approach with ineffective assessment tools, with practitioners who lack skills in vital areas, something needs to be done. The limitations of this study were pointed out and recommendations were made regarding problem areas identified in this study. Lastly, the prospects of future research were also addressed.

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ANNEXURE: A INFORMED CONSENT

TITLE: AN EXPLORATION OF THE CRIMINOLOGIST'S ROLE IN ESTABLISHING THE CRIMINAL CAPACITY OF CHILDREN IN CONFLICT WITH THE LAW.

RESEARCHER: M HUMAN

CELL NO: 0845117329

THE AIM OF THE STUDY: The aim of this explorative and descriptive study is to establish if criminologists could assist in the criminal capacity assessment of children in conflict with the law. One of the objectives is to establish if the current criminal capacity assessment process is adequate and in the best interest of the child. The second objective is to establish if criminologists could be included in a multi-disciplinary criminal capacity assessment team. On completion of the researcher's degree, the findings will be available to access from the Unisa library. Data will be stored on an external hard drive safeguarded by a password.

As experts in the field of the Child Justice System I (the researcher) invite you to participate in this study. Your contributions in this study are highly appreciated and valued.

Upon agreement to participate in the study, all participants will have the following rights:

- You have the right to be treated with dignity and respect.
- You have the right to be informed about the purpose of the research.
- You are free to end the involvement or to cancel your consent to participate in the research.
- You are free to determine that specific information and/or all information is not recorded, and that the researcher only uses written notes to obtain the necessary information.
- All information retrieved in this study will be stored on an external hard drive and safeguarded by a password.

I the participant hereby consent to:

- Participate and be interviewed for the research study on the topic, an exploration of the criminologist's role to establish the criminal capacity of children in conflict with the law.
- To follow-up interviews if the researcher deems it necessary.
- The interviews being recorded by using any electronic device (audio recorder) such as a tape recorder, iPad or cell phone.
- The use of the data and information provided by me, and redeemed from the interview, for the purpose of the researchers study.

I also understand that:

- I will not be reimbursed for any information I made towards the research;
- I will not personally benefit from the study, but I do understand that I may benefit in my professional capacity as a role player in the Child Justice System.

I hereby acknowledge that the researcher has:

- Discussed the aims and objectives of this research project with me.
- Informed me about the contents of this agreement.
- Explained the implications of my signing this agreement.

In co-signing this agreement, the researcher undertakes to:

- Maintain confidentiality, anonymity and privacy regarding the identity of the participant and information rendered by the interviewee to the researcher.

(Interviewee signature)

(Date)

M Human (Researcher)

(Date)

I, Maryna Human, certify that I have explained the contents of the above document in full detail to the interviewee.

ANNEXURE: B

INDIVIDUAL AND FOCUS GROUP INTERVIEW SCHEDULE

- 1. As you know, criminal capacity assessment is currently only conducted by certain professions. Do you think this is adequate and in the best interest of the child? Please explain.**
- 2. Do you think there is scope for more role players in the criminal capacity assessment process, and would this approach be in the best interest of the child? Please explain.**
- 3. In your opinion, who should form part of such a multi-disciplinary team? Please explain.**
- 4. In your opinion, do you think criminologists could be used in the criminal capacity assessment process? Please explain.**
- 5. Do you know what the study field of criminology entails? Please explain.**

THANK YOU FOR YOUR PARTICIPATION IN THIS STUDY

ANNEXURE: C



Ref: CLAW2014/ST42A

Applicant: M Human

COLLEGE OF LAW RESEARCH ETHICS REVIEW COMMITTEE

2015/01/07

Dear Ms M Human

ETHICAL CLEARANCE APPLICATION: THE ROLE AND VALUE OF THE CRIMINOLOGIST IN ESTABLISHING CRIMINAL CAPACITY OF CHILDREN

Thank you for the application for research ethics clearance by the College of Law Research Ethics Review Committee for the above mentioned research project. The ethical clearance application for the above mentioned research project has been approved.

The proposed research may now commence with the proviso that:

- 1) *The researcher/s will ensure that the research project adheres to the values and principles expressed in the UNISA Policy on Research Ethics, which can be found at the following website: http://www.unisa.ac.za/cmsys/staff/contents/departments/res_policies/docs/Policy_Research%20Ethics_rev%20app%20Council_22.06.2012.pdf*
- 2) *Any adverse circumstance arising in the undertaking of the research project that is relevant to the ethicality of the study, as well as changes in the methodology, should be communicated in writing to the Chair of the College of Law's Research Ethics Review Committee. An amended application could be requested if there are substantial changes from the existing proposal, especially if those changes affect any of the study-related risks for the research participants.*
- 3) *The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study.*

Yours Faithfully,

Prof Marelize Schoeman
Chairperson Research Ethics Review Committee
College of Law

Prof S Songca
Executive Dean
College of Law




University of South Africa
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Open Rubric

ANNEXURE: D

ASSESSMENT PROFORMA


-DEPARTMENT OF SOCIAL DEVELOPMENT-

Assessment Report for Children In Conflict With the Law [in terms of section 40 of the Child Justice Act]

Probation Officer: _____
Office Address: _____
Officer Telephone Number: _____
Magisterial District: _____
Assessment Date: /...../...../2012 Assessment Time [Start]:
Court: _____ CAS Number:
Supervisor Name: _____

PERSONAL DETAILS [CHILD]

Name: Surname:
Alias:
Address:
Date Of Birth/...../19... Confirmation Of Date Of Birth ☐ Y ☐ N
Gender: ☐ Male ☐ Female
Identity Number: Age Verification / Estimation: Years
Age Verification Source: ☐ birth certificate ☐ ID ☐ baptismal certificate

Population Group:

- ☐ Asian
- ☐ Black
- ☐ Coloured
- ☐ White
- ☐ Other (Specify)

Nationality: **Religion:**

Language:

- ☐ English
- ☐ Afrikaans
- ☐ Xhosa
- ☐ Zulu
- ☐ Tswana
- ☐ Sesotho
- ☐ Sepedi
- ☐ Venda
- ☐ Tsonga
- ☐ Ndebele
- ☐ SeSwati
- ☐ Other (Specify)

B: MEDICAL INFORMATION:

Health Status (Physiological / Physical):

Injuries:

Medication:

Future Medical Appointments:

C: EDUCATIONAL BACKGROUND

First School Attended: [Grade 1]

Name Of Previous Schools Attended:

Name Of Current School:

Date Last Attended:

School Address:

Grade Completed: **Year:**

Name of Educator:

Additional Information:.....

Verification Sources:

D: PRIMARY CAREGIVER INFORMATION

Name: Surname:

Relationship:

Residential Address:

Years with Current Caregiver: Years

Work Address

Telephone (H): Telephone (W):

Cell: Other:

E: FAMILY INFORMATION

Composition:

Relationship	Name	Surname	Date Of Birth / Age
Father			
Mother			

Family Background:

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F: SOCIO-ECONOMIC CIRCUMSTANCES

☐ **Social Circumstances**

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☐ **Previous Interventions**

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☐ **Interpersonal Relationships**

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☐ **Peer Group Pressure / Gang Involvement:**

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☐ **Substance Abuse**

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☐ **Religious Involvement**

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☐ **Finance & Work Record**

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☐ **Housing**

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☐ **Other**

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G: CASE INFORMATION (PARTICULARS OF ALLEGED OFFENCE)

Nature of Offence:

Charge:

Circumstances of Offence:

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Value Of Goods: R..... Value Recovered: R.....

Does the Child accept/acknowledge Responsibility for the Offence: ☐ Y ☐ N

Date Of Arrest: /...../...../20..... Time Of Arrest :, am/pm

Arresting / Investigating Officer:

SAPS Station: Telephone Number:

Place of Detention:

Date of First Appearance: Number Of Days In Custody:

Co - Accused: ☐ Y ☐ N

Name Of Co-Accused	Age
.....
.....

Legal Representation: ☐ Y ☐ N

Legal Representative: (Name)

Previous Involvement in Crime / Arrests / Convictions:

Date Of Conviction	Nature Of Offence	Sentence / Outcome
.....

Abscondments / Escapes:

Date	When?	Where?
.....

Victim Particulars:

Name: Surname:

Age: Gender: ☐ M ☐ F

Care Giver Full Names (If Victim Is A Minor):

Residential Address:

Telephone (H): Telephone (W):

Cell: Other:

Intervention Services / Referrals ☐ Y ☐ N

H: DEVELOPMENTAL ASSESSMENT

Belonging

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Mastery

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Independence:

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Generosity:

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I: EVALUATION:

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J: RECOMMENDATION

☐ **Diversion**

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☐ **Conversion**

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☐ **Placement:** **Placement Confirmed:** ☐ Y ☐ N [supported
by current and reliable info- accommodation – clause 40 (2)]

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☐ **Normal court procedures to be followed**

K: SOURCES CONSULTED:

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L: EFFORTS TO TRACE FAMILY:

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M: GENERAL:

Assessment Time [Finish]:

Additional Information:
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.....
.....

Probation Officer:

Date:

ANNEXURE: E

CRIMINAL CAPACITY CHECK LIST



Western Cape
Government

BETTER TOGETHER.

CHECKLIST FOR ASSESSMENT OF CRIMINAL CAPACITY OF CHILDREN (OLDER THAN 10yrs AND YOUNGER THAN 14yrs) IN CONFLICT WITH THE LAW. (Attach to assessment report)

This checklist is a screening tool to assist the presiding officer with regard to referral for establishing possible criminal capacity – see Section 40 (1) (f) of the Child Justice Act, 75 of 2008 in this regard.

CHILD'S NAME: MALE ☐ FEMALE ☐

DATE OF BIRTH: AGE: YRS MTHS

GRADE: NAME OF SCHOOL:

CHILD'S HOME ADDRESS:

NAME OF PARENT(S): MOTHER: FATHER:

	1 = VERY POOR	2 = POOR	3 = NORMAL	4 = GOOD	5 = VERY GOOD
• Is the child's school progress normal for age? (Has not failed more than once, has reasonable school attendance)					
• Does the child look healthy and normally developed for age?					
• Can the child give a coherent account of the alleged incident and can s/he explain her/his own actions in a clear and logical way? (Does language development seem normal for age?)					
• Does the child understand that the alleged behaviour is wrong? Does s/he understand the consequences of such behaviour?					
• Are the child's home circumstances conducive to normal development? (at least one parent, adequate					

The Afrikaans or Xhosa version of this document is available on request.

parental supervision, absence of abuse, substance abuse, domestic violence?)					
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TOTAL:

If the score is 15 or more than it should be suspected that the child may have criminal capacity and the child should be referred for formal assessment.

.....
PROBATION OFFICER

DATE:

{See section 7-11 of the Child Justice Act,75 of 2008 on criminal capacity}